IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. , Original.

IN EQUITY.

THE STATE OF MINNESOTA, PLAINTIFF,

vs.

FRANKLIN K. LANE, Secretary of the Interior of the United States, and CLAY TALLMAN, Commissioner of the General Land Office of the United States, DEFENDANTS.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

Now comes the State of Minnesota by its Attorney General, Lyndon A. Smith, and its Assistant Attorney General, Clifford L. Hilton, and moves the court that the State of Minnesota be permitted to file its bill of

complaint in equity herewith exhibited against Franklin K. Lane, Secretary of the Interior of the United States, a citizen of the State of California, and Clay Tallman, Commissioner of the General Land Office of the United States, a citizen of the State of Nevada, as a cause of which this court has original jurisdiction under section 2, article III, of the Constitution of the United States, and that upon the filing thereof a subpoena issue, as provided by Rule 12 of the Rules of Practice in Equity.

THE STATE OF MINNESOTA,
By LYNDON A. SMITH,
Attorney General,

CLIFFORD L. HILTON,
Assistant Attorney General,
St. Paul, Minnesota.

CHARLES R. PIERCE,
Washington, D. C.,
Of Counsel.

IN THE

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OCTOBER TERM, 1916.

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STATE OF MINNESOTA, PLAINTIFF,

vs.

FRANKLIN K. LANE, Secretary of Interior, of the United States, and CLAY TALLMAN, Commissioner of General Land Office of the United States, DEFENDANTS.

BILL FOR INJUNCTION AND EQUITABLE RELIEF.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The State of Minnesota, *Plaintiff*, by its Attorney General, Lyndon A. Smith, and its Assistant Attorney General, Clifford L. Hilton, by leave of the court first had and obtained, brings this, its Bill of Complaint, on its own behalf, against Franklin K. Lane, *Defendant*,

the Secretary of the Interior, a citizen of the State of California, and Clay Tallman, *Defendant,* the Commissioner of the General Land Office, a citizen of the State of Nevada, both of whom are temporarily residing in the District of Columbia. Thereupon your orator complains and says:

1. That the State of Minnesota is one of the States of the American Union and is a sovereign State of the United States. That at the time of the filing of this bill the defendant, Franklin K. Lane, was and he still is the Secretary of the Interior, and, as such, has supervision and control of the administration of the laws of the United States relating to the public lands, and that the defendant, Clay Tallman, was and he still is the Commissioner of the General Land Office, and, as such, has direct charge of the administration of the public land laws under the supervision of the Secretary of the Interior.

2. That Congress by the Act of August 3, 1892 (27 Stat., 347, Chapter 362) enacted the following statute:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that all undisposed lands of the United States situated in the following subdivisions, according to the public surveys thereof, to-wit: Section six of township *one hundred and forty-two;* section six, seven, eighteen, nineteen, thirty and thirty-one of township *one hundred and forty-three,* all in *range thirty-five;* sections one, two, three and four of township *one hundred and forty-two;* and sections one, two, three, four, nine,

ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty seven, twenty-eight, thirty-three, thirty-four, thirty-five and thirty-six of township *one hundred and forty-three, all in range thirty-six,* situate in the district of lands subject to sale at Saint Cloud and Crookston, Minnesota, is hereby forever granted to the State of Minnesota, to be perpetually used by said State as and for a public park: PROVIDED, That the land hereby granted shall revert to the United States, together with all improvements thereon, if at any time it shall cease to be exclusively used for a public state park; or if the State shall not pass a law or laws to protect the timber thereon.

Section 2. That this Act shall not in any manner whatsoever interfere with, supersede, suspend, modify, or annul the vested rights of any person, company, or corporation, in respect to any of said lands existing at the date of the passage of this Act.

3. That on April 20, 1891, by Chapter 56, General Laws of Minnesota, 1891, the State of Minnesota established the Itasca State Park containing an area identical with that embraced in the grant to the State of Minnesota by the Act of August 3, 1892 (27 Stat., 347) and provided for the acquisition of the lands in said Park. That on April 20, 1891, the State of Minnesota owned certain lands in said area. That since April 20, 1891, the State has acquired large areas of land within the limits of the said Park by grant, condemnation, purchase and donation. That prior to August 3, 1892, the title to a considerable area of said Itasca Park was in the United States. That the location of said Park is at

the "ultimate reservoir" of the Mississippi River and embraces the headwaters and sources of the said river. That the State has, as required by the Act of August 3, 1892, *supra*, passed laws for the protection of the timber and shrubbery within said park limits and has vigorously enforced said laws both with respect to depredations and fires. That the State has used said area solely as a Park and for the protection of said "ultimate reservoir." That the State has expended large sums of money in improvements to protect the headwaters and timber in said park, including the building of fire lanes and fire breaks. That for the improvement, protection, administration, addition and extension of the said park the State has expended and appropriated not less than $450,000.00, particularly as shown by the following enactments:

Chapter 15, General Laws, 1893; Chapter 106, General Laws, 1895; Chapter 303, General Laws, 1899; Chapter 52, General Laws, 1901; Chapter 354, General Laws, 1901; Chapter 218, General Laws, 1903; Chapter 258, General Laws, 1903; Chapter 277, General Laws, 1905; Chapter 45, General Laws, 1907; Chapter 90, General Laws, 1903; Chapter 171, General Laws, 1909; Chapter 320, General Laws, 1909; Chapter 531, General Laws, 1913; Chapter 559, General Laws, 1913.

That the State has since August 3, 1892, complied with the conditions of the said grant, has protected its possession of the said lands, and has not alienated any of said lands. That no action or proceeding seeking to

forfeit said lands has been initiated in the courts or in Congress.

4. That notwithstanding the said Act of August 3, 1892, *supra,* a certain corporation known as the Immigration Land Company, of Minnesota, on February 9, 1907, filed in the United States Land Office at Crookston, Minnesota, a pretended application now officially designated as Crookston 05008. That the said pretended application covers the following lands granted August 3, 1892, to the State of Minnesota:

N-2 NW-4, SE-4 NW-4, W-2 NE-4, W-2 SE-4, SE-4 SE-4, SE-4 SW-4, Section 21; Lots 1, 2, 3, E-2 SW-4, SW-4 SE-4 Section 23; N-2 NW-4, SW-4 NW-4, SW-4 SE-4, E-2 SE-4, Section 25; NW-4, SW-4, SE-4 SE-4, N-2 SE-4, SE-4 NE-4, Section 27; Lot 1, Section 33, N-2 NE-4, N-2 NW-4 SW-4 NW-4, NE-4 SW-4, NE-4 SE-4, Section 35; all in Township 143 N., Range 36 W., 5th Principal Meridian embracing 1616.49 acres.

5. That on October 30, 1909, the Commissioner of the General Land Office instructed the Register and Receiver at Crookston, Minnesota, to receive the said pretended application of the Immigration Land Company to permit the Immigration Land Company to make proof upon said lands and to permit the said applicants to pay the purchase price thereof. That the Register and Receiver did permit the said Immigration Company to complete the said pretended application for the land, did order and allow the hearing thereon, did re-

ceive the purchase price thereon at the rate of $1.25 per acre and did issue a receipt thereon for the said purchase price, February 10, 1910.

6. That neither on October 30, 1909, nor at any other time, did the Commissioner of the General Land Office either direct or require that the Immigration Land Company or the Register and Receiver notify the State of Minnesota of the said intended procedure upon said pretended application, and the State was not notified to appear at said hearing and did not appear and was not represented. That the State only learned of the said procedure long after the conclusion thereof through other sources. That shortly after hearing of the said intended procedure the State filed a protest against the said action under date of March 5, 1912.

That the State then proceeded under the Rules of Practice in the Land Department vigorously and with no delay or default and did prosecute said protest in the Office of the Commissioner of the General Land Office and in the office of the Secretary of the Interior, filing elaborate printed and written briefs and exhibits and arguing the matter orally both before the Commissioner and the Secretary of the Interior. That the State has now exhausted every possible means afforded in the Rules of Practice of the Land Department to prevent the approval of and patenting under the said pretended application known as Crookston 05008.

7. That by letter "F" of January 26, 1915, the Commissioner of the General Land Office dismissed the pro-

test of the State and ~~approved~~ Rels for approval the pretended application of the Immigration Land Company filed on or about February 9, 1907. That notwithstanding the pretended application, Crookston 05008, had never been formally approved, was not placed of record nor asserted as a right until February 9, 1907, and notwithstanding no purchase money was tendered the United States as the purchase price for the said lands until February 10, 1910, the Commissioner of the General Land Office in said decision against the State on January 26, 1915, held that the alleged right of the Immigration Land Company and its predecessors in interest title to purchase these lands from the United States existed on August 3, 1892, as a vested right and that by the Act of August 3, 1892, *supra*, Section 2, all of the said lands were excepted from the grant to the State of Minnesota. That a copy of the said Commissioner's decision of January 26, 1915, is attached herewith as Exhibit No. A. That the said decision and opinion of the Commissioner of the General Land Office dismissing the protest of the State of Minnesota and instructing the allowance of the Immigration Land Company's application known as Crookston 05008, was affirmed by the Secretary of the Interior by opinion dated June 29, 1916. That the motion on the part of the State of Minnesota for a rehearing was denied by the Secretary of the Interior on September 30, 1916.

8. That the Immigration Land Company filed its pretended application to purchase these lands under

Section 5 of the Act of March 3, 1887, (24 Stat., 556, Chapter 376) which provides:

> That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being co-terminous with the constructive parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona-fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns: Provided, that all lands shall be excepted from the provisions of this section which at the date of such sales were in the *bona fide* occupation of adverse claimants under the Pre-emption or Homestead Laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimant shall be permitted to perfect their proofs and entries and receive patents therefor: Provided further, that this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty two, by persons claiming to enter the same under the Settlement Laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

9. That the said lands, with others, were by certain pretended deeds dated January 14, 1891, attempted to be conveyed by the Northern Pacific Railroad Company

to Frederick Weyerhaeuser and others. That by certain pretended deeds the said Frederick Weyerhaeuser and others on October 1, 1898, and January 3, 1907, attempted to convey title of the lands here involved to the Immigration Land Company, organized by Frederick Weyerhaeuser and others and incorporated on July 15, 1898.

10. That neither on January 14, 1891, nor at any other time prior or subsequent thereto had the Northern Pacific Railroad Company any right, title, or interest, legal or equitable, in the said lands or a power to convey said lands now applied for by the Immigration Land Company in said pretended application, Crookston 05008. That the said deeds were entirely without force or validity and did not affect the right or title of the United States with respect to said lands.

11. That the said lands are within the second indemnity belt of the Northern Pacific Railroad Company as authorized by the Joint Resolution of Congress of May 31, 1870 (16 Stat., 378) which amends the act granting the primary limits and establishing the first indemnity belt of the Northern Pacific Railroad Company of July 2, 1864 (13 Stat., 365).

12. That on December 26, 1871, the said described lands now included in Crookston 05008, were withdrawn from settlement and entry by the Commissioner of the General Land Office in aid of the indemnity selections of the Northern Pacific Railway Company.

That by orders of the Secretary of the Interior dated August 15, 1887, (unpublished), and September 6, 1887 (6 L. D., 131) the said lands embraced within the said indemnity withdrawal were released from the withdrawal and from the force and effect of the said withdrawal. That from September 6, 1887, to August 3, 1892, the said lands were not embraced within an indemnity or other withdrawal.

13. That on October 15, 1883, the Northern Pacific Railway Company made an attempted indemnity selection for the said lands now sought to be purchased by the Immigration Land Company with other lands. That the said proffer is officially designated as Crookston List No. 12. That the bases given in support of the selections were lands excepted from the grant to the Northern Pacific on July 2, 1864, by reason of a reservation subsisting at that date in aid of the grant for the construction of the Lake Superior and Mississippi Railroad under the Act of May 5, 1864 (13 Stat., 64).

14. That with said Crookston Indemnity List No. 12 the Northern Pacific Railroad Company proffered bases of approximately equal area with the lands selected.

15. That with said Crookston Indemnity List No. 12 the proffered selections were in bulk and the proffered bases were in bulk. That the selections and the bases were not arranged tract for tract.

16. That on April 19, 1893, the Northern Pacific Railroad Company filed a re-arranged selection list des-

ignating the losses as above specified, tract for tract, with the lands selected.

17. That the selection as to said lands was illegal because the bases proffered October 15, 1883, and rearranged April 19, 1893, were not losses as provided by the Joint Resolution of Congress of May 31, 1870, *supra*.

18. That the said Northern Pacific indemnity selection with respect to said lands now embraced in Crookston 05008, was not approved on or prior to August 3, 1892, nor at any time subsequent thereto.

19. That the said described lands embraced in said selection between August 13, 1887, and July 14, 1899, and particularly on August 3, 1892, were subject to the instructions of the last paragraph, page 91, of the decision of August 13, 1887, (6 L. D., 85 at 91) and also subject to the instructions of the third and fourth paragraphs of the Circular of September 6, 1887, (6 L. D., 131). That the said instructions of August 13, 1887, *supra*, and September 6, 1887, *supra*, were not revoked or modified on August 3, 1892, nor until the Circular of July 14, 1899 (29 L. D., 29) was promulgated and interpreted.

20. That from August 3, 1892, until October 30, 1909, various actions were taken by the Northern Pacific Railroad Company looking to the correction of the said Crookston List No. 12, including the filing of said rearranged list on April 19, 1893 and including several

attempts to substitute other bases. That said procedure was taken in the Land Department wholly without notice to the State, either by the Land Department or by the Northern Pacific Railroad Company or its alleged transferees. That the State was entirely ignorant of these proceedings and was not a party thereto. That the said Crookston List No. 12 remained of record a long and reasonable length of time to give said Railroad Company the oportunity to correct the said selection. That the said selection was finally rejected and the records cleared therefrom on October 30, 1909.

21. That by reason of the facts hereinbefore recited the lands embraced within Crookston 05008 sought to be purchased by the Immigration Land Company from the United States, were on and before August 3, 1892, vested absolutely in the United States which had the full fee simple title and full power of disposing of the same. That the alleged outstanding claim of the Northern Pacific Railroad Company by reason of Crookston List No. 12, on August 3, 1892, was unapproved and was illegal, because no proper bases were proffered; informal because said selected land was not arranged tract for tract with the said losses; That the said Crookston List No. 12 was not a vested right; that the alleged right of purchase of the Immigration Land Company was not on August 3, 1892, exercised nor capable of being exercised; That the said right was not a vested right; That the said lands by the Act of August 3, 1892, *supra*, were granted by the United States to the

State of Minnesota; That on August 3, 1892, the State thereby became vested in fee simple title to said lands without action on the part of the Land Department; that thereafter it was not within the power of the then Secretary of the Interior or any of his successors in office, or of the then Commissioner of the General Land Office or any of his successors in office or of any officer of the Government of the United States effectively to divest the title of the State or to injuriously affect the rights of the State by clouding its title.

22. That heretofore the Officials of the Interior Department have disregarded the grant to the State and without notice to the State have injured the rights of the State with respect to its grant by issuing under similar circumstances, a pretended patent unto the Immigration Land Company in case known as Crookston 05007 for the following described land:: NW-4 SE-4, Section 23, Tp. 143 N., Range 36 W., 5th Principal Meridian, Patent No. 231,223, dated October 23, 1911. That the State was at no time notified by the Land Department or by the Immigration Land Company of this intended procedure, was ignorant thereof and was not a party thereto.

23. That the said defendants propose and intend by the said orders dated January 26, 1915, *supra*, and June 29, 1916, *supra*, and unless restrained will, in professed accordance with the laws of the United States relating to the public lands, convey a pretended patent or title

in fee simple to the Immigration Land Company by reason of its pretended application known as Crookston 05008 for the lands heretofore designated and described and within the grant by the United States to the said State, to the end that the said Immigration Land Company may become permanently and irrevocably vested with fee simple title to the said lands and to the end that the State of Minnesota may be permanently and irrevocably divested of all right, title and claim to the said lands.

24. That the proposed action of the Secretary of the Interior and the Commissioner of the General Land Office, unless restrained and prevented, as in this proceeding asked for, will cloud the title of the State of Minnesota to the lands hereinbefore described and necessitate divers suits to remove such cloud and will also subject the State of Minnesota to a multiplicity of suits to quiet title to other lands whose status and title will of necessity be affected by the principle contended for in the decisions referred to.

25. That the State further avers that it intends to proceed to maintain and enforce its right as owner to all of the lands granted by the Act of August 3, 1892, *supra*.

26. That the State is informed and believes and therefore avers that the land sought to be purchased by the Immigration Land Company from the United States by its pretended application is timber land of great value, to-wit, not less than $75,000.00.

27. That the State further avers that it has no adequate remedy at law and is remediless except in equity.

28. That the State avers that it has made no other or previous application for the relief asked for in this bill

Wherefore your orator prays:

1. That your Honors grant unto your orator your writ of injunction commanding the defendants, Franklin K. Lane and Clay Tallman, and each of them, and their successors in office, and all persons claiming to act under their authority, direction or control, absolutely to decist and refrain from proceeding in any manner with the proceedings in the matter of the pretended application to purchase of the Immigration Land Company, Crookston, 05008, or any other matter affecting the said land granted to the State by the Act of August 3, 1892, until such time as your Honors shall appoint and direct an order herein; and that upon such hearing the writ herein prayed be made and confirmed until the final determination of this suit; and upon such final determination be made permanent.

2. That your Honors decree that any matters shown in said records, other than the necessary notations upon the records for public information and convenience, more particularly the instructions, orders, receipts, certificates, and the approvals issued in the matter of the Immigration Land Company's application known as Crookston 05008, be canceled and expunged from the records.

3. To the end that the defendants may, if they can show why your orator should not have the relief hereby prayed, and may file, true and perfect answer make, according to the best of their knowledge, remembrance, information and belief, to the several matters hereinbefore averred and set forth, as fully and particularly as if the same were herein repeated paragraph for paragraph and they were thereto severally and specifically interrogated (but not under oath, an answer under oath being hereby expressly waived), may it please your Honors to grant unto your orator a writ of *subpœna ad respondendum*, issuing out of and under the seal of this Honorable Court, and unto the defendants, Franklin K. Lane and Clay Tallman, commanding them to appear and make answer unto this Bill of Complaint, and perform and abide by such order and decree herein as to this Court may seem to be required by the principles of equity and good conscience.

4. That your Honors will grant unto your orator such other and further relief in the premises as the nature of the circumstances of the case may require.

THE STATE OF MINNESOTA.

By LYNDON A. SMITH,
Attorney General,

CLIFFORD L. HILTON,
Assistant Attorney General,
St. Paul, Minnesota.

CHARLES R. PIERCE,
Washington, D. C.,
Of Counsel.

STATE OF MINNESOTA,
County of Ramsey, ss.

Personally appeared before me, Lyndon A. Smith, who, being duly sworn in the foregoing case, on his oath says that he is the Attorney General of the State of Minnesota; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief, and that as such Attorney General he is authorized to pray leave to file the same.

LYNDON A. SMITH.

Subscribed and sworn to before me this 20th day of October, A. D. 1916.

G. K. SPANGENBERG,
(Seal) Notary Public,
Ramsey County, Minnesota.

My commission expires March 11, 1922.

STATE OF MINNESOTA,
County of Ramsey, ss.

Personally appeared before me, Clifford L. Hilton, who being duly sworn in the foregoing case, on his oath says that he is the Assistant Attorney General of the State of Minnesota; that he has read the foregoing bill of complaint, and that the same is true to the best of his knowledge, information and belief.

CLIFFORD L. HILTON.

Subscribed and sworn to before me this 20th day of October, A. D. 1916.

G. K. SPANGENBERG,
(Seal) Notary Public,
Ramsey County, Minnesota.

My commission expires March 11, 1922.

(Endorsed.) Copy. In Supreme Court of the United States, October term, 1916. No....., Original. State of Minnesota, complainant, vs. Franklin K. Lane, Secretary of the Interior of the United States, and Clay Tallman, Commissioner of the General Land Office of the United States, defendants. Lyndon A. Smith, Attorney General, Clifford L. Hilton, Assistant Attorney General, State of Minnesota.

EXHIBIT "A."

DEPARTMENT OF THE INTERIOR

GENERAL LAND OFFICE

Washington.

Address Only the
Commissioner of the General Land Office

January 26, 1915.

State of Minnesota : Protest dismissed.
Immigration Land Co. : subject to appeal.

Register and Receiver,
Crookston, Minnesota.

Sirs:

On February 9, 1907, the Immigration Land Company filed in your office application (05008) to purchase the lands herein described, aggregating 2,368.95 acres, under section 5 of the act of March 3, 1887 (24 Stat., 556), upon which proof was submitted, after publication, on February 9, 1910, and cash certificate 05008 issued therefor, February 10, 1910:

Subdivisions	Sec.	T. N.	R. W.
W½NE¼, N½NW¼, SE¼NW¼, SE¼SW¼, W½SE¼, SE¼SE¼,	21	143	36
Lots 1, 2, 3, E½SW¼, SW¼SE¼	23	"	"
N½NW¼, SW¼NW¼, E½SE¼, SW¼SE¼	25	"	"
SE¼NE¼, NW¼, SW¼, N½SE¼, SE¼SE¼	27	"	"
W½NE¼, N½NW¼, SE¼NW¼,	29	"	"

Crookston 05008 F J8J.

Subdivisions.	Sec.	T. N.	R. W.
Lots 1, 2, 3, NW¼NE¼, S½NE¼, E½NW¼, E½SW¼, NE¼SE¼	31	143	36
Lot 1,	33	"	"
N½NE¼, N½NW¼, SW¼NW¼ NE¼SW¼, NE¼SE¼,	35	"	"
Lots 1, 2 SE¼NE¼,	1	140	"

These tracts of land are within the second indemnity limits of the grant to the Northern Pacific Railroad (now Railway) Company, under act of July 2, 1864 (13 Stat., 365), as amended by Joint Resolution of May 31, 1870 (16 Stat., 378). On October 15, 1883, said railway company selected all of the above described tracts of land per list No. 12, Crookston, rearranged list No. 12 filed April 19, 1893. The bases given in support of the selections covered by such rearranged list were lands claimed to have been excepted from the company's grant of July 2, 1864, supra, by reason of the reservation subsisting at the date thereof on account of the grant made by the act of May 5, 1864 (13 Stat., 64), to aid in the construction of the Lake Superior and Mississippi Railroad.

Said list of selections No. 12 was canceled as to these and other tracts of land by letter "F" of March 20, 1907, upon authority of the decision of the Supreme Court of the United States in the case of the Northern Lumber

Company vs. O'Brien (204 U. S. 190), but the cancellation was suspended by the order of the Secretary of the Interior on April 1, 1907, and remained in that status until October 30, 1909, when said list of selections No. 12 was canceled as to these and other tracts of land.

The decision of the Department, dated October 11, 1909, was promulgated by said letter "F" of October 30, 1909, and your office was instructed as follows:

> "Said lands are now subject to entry by the first legal applicants after receipt of this letter, except such tracts for which applications may now be pending, as to which tracts you will suspend any new applications therefor until pending applications shall have been disposed of. If any applications are pending in your office, you will forward them at once except in the matter of the applications of the Immigration Land Company to purchase certain of the lands under the act of March 3, 1887 (24 Stat., 556), referred to in your letter of February 14, 1907, in which case you will proceed with publication of notice and hearing of proofs."

Section 5 of the act of March 3, 1887 (24 Stat., 356), provides as follows:

> "That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment

to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: Provided, That all lands shall be excepted from the provisions of this section which, at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: Provided further, That this section shall not apply to lands settled upon subsequent to the first day of December, 1882, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases."

The instructions issued February 13, 1889 (8 L. D., 348), under said act of March 3, 1887, provide as follows:

"1. That the tract was of the numbered sections prescribed by the grant.

2. That it was coterminous with constructed parts of said road.

3. That it was sold by the company to the applicant, or one under whom he claims, as a part of its grant.

4. That it was excepted from the operation of the grant.

5. That at the date of said sale it was not in the bona fide occupancy of adverse claimants under the pre-emption or homestead laws, whose claims and occupancy have not since been voluntarily abandoned.

6. That it has not been settled upon subsequent to the first day of December, 1882, by any person or persons claiming the right to enter the same under the settlement laws.

7. That the applicant is, or has declared his intention to become a citizen of the United States.

8. And that he, or one under whom he claims, was a bona fide purchaser of the land from the company.

The proof upon these points being found satisfactory, the entry will be allowed and the usual cash certificate and receipts will be issued thereon reciting the fact that the entry is in accordance with the fifth section of the act of March 3, 1887 (24 Stat., 556)."

On March 5, 1912, the Governor and Attorney General for the State of Minnesota addressed the following telegram to the Secretary of the Interior, to-wit:

"The State of Minnesota claims right to all unpatented lands within the Itasca State Park under act of August 3, 1892 (27 Stat., 347), being lands in township 143 N., range 36 W. of fifth P. M. Kindly refrain from issuing patents to Immigration Land Company under cash entry No. 05008 February 10, 1910, or otherwise conveying any such lands. Formal claim and protest will follow within two weeks with request for hearing."

On March 18, 1912, the Assistant Attorney General of the State of Minnesota transmitted a protest to this office, making and asserting formal claim on behalf of the State of Minnesota to the tracts described below, aggregating 1,616.49 acres, which are situated within the limits of what is known as the Itasca State Park, to-wit:

Subdivisions.	Sec.	T. N.	R. W.
N½NW¼, SE¼NW¼, W½NE¼, W½SE¼, SE¼SE¼, SE¼SW¼,	21	143	36
Lots 1, 2, 3, E½SW¼, SW¼SE¼,	23	"	"
N½NW¼, SW¼NW¼, SW¼SE¼, E½SE¼	25	"	"
NW¼, SW¼, SE¼SE¼, N½SE¼, SE¼NE¼,	27	"	"
Lot 1,	33	143	36
N½NE¼, N½NW¼, SW¼NW¼, NE¼SW¼, NE¼SE¼,	35	"	"

The lands above described, with others were sold and conveyed by the Northern Pacific Railway Company by warranty deed for a valuable consideration, January 14, 1891, to Frederick Weyerhaeuser, Peter Musser and M. G. Norton, whose title was afterwards conveyed by certain mesne conveyances to the applicant Immigration Land Company as set forth in its application to purchase dated February 2, 1907, and filed in your office February 9, 1907.

The Attorney General for the State sets forth that these last described tracts of land and all thereof, are claimed by the State of Minnesota as inuring to it by

virtue of the act of August 3, 1892 (27 Stat., 347), which provides as follows:

> "That all undisposed of land of the United States situated in the following subdivisions, according to the public surveys thereof, to-wit: * * * is hereby forever granted to the State of Minnesota, to be perpetually used by said State as and for a public park; Provided, That the land hereby granted shall revert to the United States, together with all improvements thereon, if at any time it shall cease to be exclusively used for a public State park; or if the State shall not pass a law or laws to protect the timber thereon.
>
> Sec. 2. That this act shall not in any manner whatsoever interfere with, supersede, suspend, modify, or annul the vested rights of any person, company, or corporation in respect to any of said lands existing at the date of the passage of this act."

The grant was accepted by the State of Minnesota by an act passed by the State Legislature on April 19, 1893.

On May 8, 1912, the attorneys on behalf of the State of Minnesota and the Immigration Land Company were advised by letter "F" that a reasonable time would be allowed the parties in interest to file a stipulation or agreement looking to an adjustment of their conflicting claims, and on application of both parties an extension of time was allowed to July 26, 1912, October 8, 1912, and March 8, 1913, respectively.

On April 19, 1913, and April 23, 1913, respectively, Assistant Attorney General for the State and the attorneys for the Immigration Land Company advised this office that the parties in interest were unable to agree

upon any terms of stipulation, and it was suggested by the attorney for the State that if a hearing be deemed advisable it be not ordered until after June 30, 1913.

In the petition of the State, transmitted to this office, March 18, 1912, it is set forth, among other things, that:

> "That the proper official, whether the same be the Secretary of the Interior or the Commissioner of the General Land Office, forthwith make such order in the premises as may be necessary to bring up for determination before the proper officials, the question of the rights of the State of Minnesota to said lands and the adverse claims of said Immigration Land Company or other parties thereto, and to that end make an order for a hearing thereon, either with or without oral argument, or for the filing of briefs as to said ordering official may seem expedient and proper in the premises. That until such determination by hearing or otherwise, no patents to said lands or any of them be issued."

In view of the foregoing, by letter "F" of August 12, 1913, the Register and Receiver at Crookston were directed to notify the proper authorities of the State that thirty days would be allowed within which to file a brief in support of its claim, and that copies of any paper or papers that might be filed should be served upon the Immigration Land Company. In response to this notice, a printed brief was filed in behalf of the State, and a brief was filed in behalf of the Immigration Land Company, and a reply brief on behalf of the State was filed by counsel for the State. With due notice, an oral hearing was had November 24, 1914, at which both parties appeared and were heard by counsel.

The issue involved in this case, briefly stated, is as follows:

The attorneys on behalf of the State of Minnesota contend that the lands herein involved, which are situated within the limits of the Itasca State Park, were granted to the State by act of August 3, 1892 (27 Stat., 347), and it is urged on the part of the State that the grant took effect immediately, the lands being "undisposed of" on that date, and that the claim asserted by the Immigration Land Company does not have the dignity of the "vested right," protected in Sec. 2 of said act.

On behalf of the Immigration Land Company it is contended that these lands were segregated from the mass of public lands by Crookston indemnity list of selections No. 12, made October 15, 1883, which was not canceled from the records until October 30, 1909; that the sale of the lands covered by cash entry No. 05008, in the name of the Immigration Land Company, by said railway company on January 14, 1891, was bona fide and for a valuable consideration, and it is urged that the Immigration Land Company should have its purchase of said lands protected under Sec. 5 of the act of March 3, 1887 (24 Stat., 556), and receive patent therefor; the attorneys for the Land Company contending that the lands involved were not "undisposed of lands" on August 3, 1892, the date of the grant to the State.

The act of March 3, 1887 (24 Stat., 556), is remedial in its character, and should be liberally construed, so as

to include, embrace or extend the remedy and protect those who, in good faith, bought the land, supposing the same to have passed to the railway company under its grant (Clogston v. Palmer, 32 L. D. 80).

On November 17, 1887 (6 L. D., 272), Attorney General Garland gave an opinion on certain questions propounded on the third, fourth and fifth sections of the act, and said:

> "The whole scope of the law from the second to the sixth section, inclusive, is remedial. Its intent is to relieve from loss settlers and bona fide purchasers, who, through an erroneous or wrongful disposition of the lands in the grants, by the officers of the government, or by the railroads, have lost their rights or acquired equities, which in justice should be recognized * * * the whole remedial part of the law was passed with a recognition of the fact that the railroad companies had sold lands to which they had no just claim. * * * In order that the remedy may be adequate to redress the wrong, the word 'grant,' in the fifth section, must be construed to include, as it does in the preceding sections of the act, both primary and indemnity limits."

Under the decisions it is the failure of the title of the company that brings the act of March 3, 1887, into operation for the perfection of a title not acquired under the railroad grant.

These particular lands were excepted from the operation of the company's grant, because of its failure to perfect its selection, the base designated therefor being finally held insufficient by the supreme court.

The right of purchase under Sec. 5 of the act of March 3, 1887, has been recognized where the lands were in the indemnity limits, but had not been selected by the railway company, it being held that the failure to select such lands effectively excepted the tracts involved from the operation of the grant (Pierce, et al. vs. Musser-Sauntry Co., 19 L. D., 136; Gertgens v. O'Connor, 191 U. S., 237). These authorities are doubtless controlling, however repugnant they may be to our views of the scope of the Act of March 3, 1887, as an original proposition.

The qualifications of the grantees are not questioned, nor is the good faith of the purchase an issue. All subsequent purchasers, including the applicant, were bona fide purchasers for valuable consideration and are citizens of the United States or a corporation in the State of Minnesota.

It appears from the record in the case, that for the years from 1891 to 1912, inclusive, the State of Minnesota levied taxes upon all the lands involved, and that such taxes have been paid to the amount of $4,762.50, and that taxes were levied for the year 1913. This fact is only a circumstance and not a vital issue in the case.

These particular lands were under the control of and in possession of the grantees of the Northern Pacific Railway Company on August 3, 1892, and have remained in open and actual possession of such grantees ever since (Hunt vs. Maxwell, 23 L. D., 180).

The conflict of rights under the act of March 3, 1887, under the established rulings of this Department, and the construction of the act of August 3, 1892 (27 Stat., 347), presents a question somewhat analagous to the case of Clogston vs. Palmer (32 L. D., 77), which involved the purchase of certain lands under Sec. 5 of the act of March 3, 1887, within the limits of what is known as the San Gabriel Forest Reserve, which held that Sec. 24 of the act of March 3, 1891, was not intended by Congress to authorize the President, in establishing a forest reserve, to extinguish an existing right to purchase under Sec. 5 of the act of March 3, 1887.

The leading question involved in this case is whether the act of August 3, 1892, granting certain lands to the State of Minnesota *in presenti* extinguished the existing right of the Immigration Land Company to purchase the lands involved. The boundaries of Itasca State Park are defined by the act of August 3, 1892, with the distinct provision that said act should not "interfere with, supersede," etc., the "vested rights" of any person, etc., "with respect to any of said lands."

The phrase "vested rights" is susceptible of many and widely variant definitions but it is not believed that the narrower and closer use of the term signifying a right reduced to ownership or possession was contemplated by the act of 1892, for as to rights of such character they are not subject to ordinary legislative control. It is rather believed that Congress had in mind the protection of existing valid adverse rights, such as would

ripen into title if allowed to take their ordinary course under the law as it then stood. Grants of land somewhat similar to that made by the act of August 3, 1892, containing no excepting clause whatever have been construed by the Department, nevertheless, to have no operation as to lands which at the date of such grants were embraced in entries or claims lawfully initiated pursuant to the public land laws. Such a construction was adopted and pursued in the case of ex parte Andrew J. Billan (36 L. D., 334), and again in the case of ex parte John F. Butler (36 L. D., 172). It has been seen that the right of purchase under the act of 1887 is clearly applicable to the case as made by the purchaser from the railroad company if it is not defeated or in effect repealed by the subsequent act of 1892.

It is to be observed in this case that the purchase from the railroad company was made subsequent to the passage of the act of March 3, 1887, so that the provision in section 5 for the protection of a bona fide purchaser from the railroad company forms an integral part of the contract of sale and purchase entered into between the Immigration Company and the Northern Pacific. The company bought with the knowledge that if the title of the company failed it would be permitted to perfect ownership through a purchase from the United States. Every presumption attends a conclusion that no subsequent grant by Congress contemplated the repeal of the protective provision made by the act of 1887.

This guarantee of protection constituted a "vested right" as used in the 2d section of the act of 1892.

"In its application, as a shield of protection, the term 'vested right' is not used in any narrow or technical sense, or as importing a power of legal control merely, but rather as implying a vested interest which it is right and equitable that the government should recognize and protect, and of which the individual could not be deprived arbitrarily without injustice."

Diamond State Iron Co. v. Husbands (68 Atlantic, 240);

Cooley's Constitutional Limitation (7 ed. 508).

See also:

Pearsall v. Great Northern Railway Co. (161 U. S., 646).

Accordingly, it is held that under Sec. 5 of the act of March 3, 1887, the rights of the Immigration Land Company under the facts and laws above cited are superior to the claim of the State under the act of August 3, 1892, that cash entry 05008 by said Immigration Land Company should remain intact.

The protest of the State is hereby dismissed subject to the usual right of appeal within thirty days after notice to the Secretary of the Interior.

The resident attorneys for the Immigration Land Company and the State of Minnesota, and, as per request, Messrs. Clapp and Macartney of St. Paul, Min-

nesota, will be notified hereof by this office. You will notify the proper authorities of the State.

In due time you will submit a report as to all action taken before your office in the premises.

Very respectfully,

CLAY TALLMAN,
Commissioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

IN EQUITY.

THE STATE OF MINNESOTA, Plaintiff, *vs.* FRANKLIN K. LANE, Secretary of the Interior of the United States, and CLAY TALLMAN, Commissioner of the General Land Office of the United States, Defendants.	No. 20, ORIGINAL.

MOTION FOR ORAL ARGUMENT.

Comes now the State of Minnesota by its Attorney General and moves that the Defendants' Motion to Dismiss be set down for oral argument on a day certain to be fixed by the Court.

REASONS FOR ARGUMENT.

Oral argument is requested because:

1. This is an original action in Equity and the Motion

to Dismiss corresponds to the former Demurrer; the Motion to Dismiss is not under Paragraph Four, Rule Six, of the Rules of this Court, which applies to Motions to Dismiss writs of error and appeals.

2. The land is located at the headwaters of the Mississippi River, in the Itasca State Park, and was granted to the State for the purpose of protecting the headwaters of that river. This matter is of great public importance to the State. The State has never failed in its duty to protect the land from depredation and the title from being frittered away. It, therefore, desires to present its case to the fullest extent at any proceeding of any nature.

3. The State in its Bill of Complaint in Equity asks only that the defendants be restrained from doing certain illegal acts the result of which, if not restrained, would cloud the title to certain land in the Itasca State Park and otherwise cause injury to the State. The State does not ask decrees to bolster up its title as alleged by the defendants. Such requests for decrees are obviously unnecessary, because the State has a muniment of title of the highest form; a direct grant of Congress enumerating the lands in question in the granting clause, and nothing in the excepting clause to take the lands out of the operation of the grant. The defendants claim the jurisdiction over the lands, notwithstanding the direct grant to the State. The claim of jurisdiction is founded upon the theory that an applicant who filed his application fourteen years after the land was granted to the State had a vested right to the land at the date of the grant. The claim that the said applicant had a vested right is unsupported by decisions, but is urged strenuously. The proposition that a person may have a vested right to public land before an application is filed, before the right to file an application arises and before he even desires to exercise a right under a

statute is novel and the State desires to be heard upon this point urged against its titles.

4. The defendants' Motion to Dismiss contains four assignments, not one of which under the rule of Lane vs. Watts (234 U. S. 525) is a valid ground for dismissal. The defendants, however, argue that notwithstanding the above rule, the Bill is subject to Dismissal because Louisiana vs. Garfield (211 U. S., 70), it is alleged, holds that a State cannot maintain such an action unless the title of the State is "so clear as not to admit of *argument* to the contrary." While the State believes its title is clear, it desires to oppose the rule of construction proposed by the defendants, as it is unworkable, and is not sustainable by the authorities cited.

5. The question of title raised as an issue in this case is purely a preliminay one; Philadelphia vs. Stimson (223 U. S., 605, 622, 623). The question of title lies at the foundation of any action affecting real property, but that fact alone does not make a case a title suit. Here no decrees are asked that purport to pass title or to give the State a muniment of title in the form of a decree of this court. This is essentially not a suit to establish title, nevertheless the defendants have several times referred to this action as such. The State desires to present this matter clearly.

6. Both of the Briefs of the litigants discuss the question of title fully. The title of the land, although a purely preliminary matter, is all important in determining whether the United States and the applicant should be joined as parties, whether the exclusive jurisdiction rests with the Interior Department, and finally whether the State is entitled to the relief sought. If, as the State shows, the title has passed from the United States to the State, the action can be maintained; Lane vs. Watts (234 U. S., 525).

Therefore it appearing that the Motion to Dismiss vitally affects the entire case of the State, this Motion to set the case for oral argument should be allowed.

Very respectfully submitted,

THE STATE OF MINNESOTA,
by LYNDON A. SMITH,
Attorney General;

by CLIFFORD L. HILTON,
Deputy Attorney General;

and by CHARLES R. PIERCE,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

No. 20. Original

IN EQUITY

STATE OF MINNESOTA, PLAINTIFF

vs.

FRANKLIN K. LANE, Secretary of the Interior of the United States, and CLAY TALLMAN, Commissioner of the General Land Office of the United States, DEFENDANTS.

REPLY BRIEF OF THE STATE OF MINNESOTA, PLAINTIFF, TO THE "CITATION OF AUTHORITIES" WITH DEFENDANTS' "MOTION TO DISMISS"

INTRODUCTION

This is a reply brief filed in answer to the "Citation of Authorities" or argument that accompanies the Defendants' "Motion to Dismiss."

The State, after having first received permission, filed in this Court an original Bill of Complaint in Equity, against Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, Defendants; in opposition to which the Defendants filed said Motion to Dismiss, which presents four assignments, the first three objecting to the jurisdiction of this Court, and the fourth challenging the Bill of Complaint on the ground that no facts are shown that entitle the State to the relief sought. Since the Motion to Dismiss is the pleading under the modern equity rules that takes the place of the former demurrer, the entire case is in issue.

The State in the Bill of Complaint exhibits a muniment of title to the lands in issue in the form of a direct grant of Congress of August 3, 1892 (27 Stat., 347) (R. 4). The State, previously to the grant (R. 5), had created a park to protect the headwaters of the Mississippi and the object of the grant was to consolidate the ownership of the lands of the park in the State of Minnesota for effective administration. The lands were granted with the proviso that they will be forfeited for non-compliance with trusts imposed. The Act (R. 5) excepted from the operation thereof "vested rights" of private parties and the right of forfeiture only on the part of the United States. The Commissioner of the General Office in an opinion affirmed by the Secretary (46 L. D., 7, 9) held that conflicts were excepted from the grant (R. 32-34). The Bill of Complaint sets forth these alleged adverse rights with the greatest particularity (R. 7-11, 11-14).

The defendants, therefore, by a construction of the term "vested rights," claim jurisdiction over the land in question to the extent of divesting (R. 15-16) the State of its title and to the extent of issuing patents purporting to con-

vey the title of the United States (R. 15-16) to an applicant under the public land laws upon an application filed fourteen years after the land was granted to the State, or on February 9, 1907 (R. 7). The State shows that the threatened action of the defendants will cloud the title of the State to the lands in question and cause a multiplicity of suits (R. 16). The State asks in the prayers for relief only for decrees enjoining the defendants from patenting the lands to others and to compel them to cancel orders and decisions antagonistic to the title of the State (R. 17), and does not ask, as stated in the Motion to Dismiss, page 1, for "a decree establishing the title of the plaintiff State to certain lands."

THEORY OF CASE

This Court has original jurisdiction in any action brought by a State, if the suit can be brought in a federal court; Minnesota vs. Hitchcock (185 U. S., 373, 388).

This case *draws into question* the right of the Secretary of the Interior to exercise his claimed jurisdiction under the laws of the United States, which presents a federal question; Champion Lumber Company vs. Fisher (227 U. S., 445).

The Secretary's own opinion as to the limits of his own exclusive jurisdiction, based upon a construction of a statute, is not binding upon this Court; Lane vs. Hoglund (244 U. S., 174).

The opinion and the ruling of the Secretary of the Interior as to the title to land in controversies in which his own jurisdiction is in issue, is not binding upon the Court; McBride vs. Schurz (102 U. S., 378); Noble vs. Union River Logging Company (147 U. S., 165); Lane vs. Watts (234 U. S., 525; 235 U. S., 17).

The fact that the Court must pass upon the title of land as a purely preliminary matter, where the real issue is the jurisdiction of the Secretary, does not make the case a title suit; Philadelphia Company vs. Stimson (223 U. S., 605).

The Secretary of the Interior may be restrained from clouding the title to land over which he has no jurisdiction and the title to which has passed from the United States; Lane vs. Watts, *supra*.

The numerous cases decided by this Court reduce to a minimum all questions relating to the points submitted in the Defendants' Motion to Dismiss. They will be discussed in Chapter IV and specifically answered in the Conclusion.

The preliminary but all important question whether title has passed from the United States will occupy the bulk of the briet, Chapters I to III inclusive.

CHAPTER I.

CONGRESS BY THE ACT OF AUGUST 3, 1892 (27 STAT., 347), IMMEDIATELY PASSED TO THE STATE OF MINNESOTA THE TITLE TO THE LANDS IN QUESTION.

A. THE STATUTE IS THE STATE'S MUNIMENT OF TITLE.

The lands in question and involved in this controversy (R. 7) are specifically named by Congress in the Act of August 3, 1892 (27 Stat., 347, Chapter 362):

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all undisposed lands of the United States situated in the following subdivisions,

according to the public surveys thereof, to-wit: Section six of township one hundred and forty-two; sections six, seven, eighteen, nineteen, thirty and thirty-one of township one hundred and forty-three, all in range thirty-five; sections one, two, three and four, of township one hundred and forty-two, and sections one, two, three, four, nine, ten, eleven, twelve, thirteen, fourteen, sixteen, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, thirty-three, thirty-four, thirty-five, and thirty-six, of township one hundred and forty-three, all in range thirty-six, situate in the district of lands subject to sale at St. Cloud and Crookston, Minnesota, is hereby forever granted to the State of Minnesota, to be perpetually used by said State as and for a public State park; Provided, that the land hereby granted shall revert to the United States, together with all the improvements thereon if at any time it shall cease to be exclusively used for a public State Park; or if the State shall not pass a law or laws to protect the timber thereon.

"Sec. 2. That this act shall not in any manner whatsoever interfere with, supersede, suspend, modify, or annul the vested rights of any person, company, or corporation in respect to any of said lands existing at the date of the passage of this act."

This Act of Congress also provides for no administration by the Interior Department, no further identification of the lands, no list, no patent and no administrative act whatsoever. The title passes without patent: Strother vs. Lucas (12 Pet., 410); Ryan vs. Carter (93 U. S., 78); Shaw vs. Kellogg (170 U. S., 312); Republican River Bridge Company vs. Kansas Company (92 U. S., 315).

B. THE BURDEN IS UPON THE DEFENDANTS TO SHOW THAT THE LANDS WERE NOT GRANTED.

Since the lands in question (R. 7) are named in the State's muniment of title, and are neither eliminated nor specifically excepted therefrom, the burden is shifted to the defendants to show that the said lands are excepted from the operation of the grant by Section 2.

CHAPTER II.

STATEMENT OF THE FACTS, THE LEGAL STATUS OF THE LANDS IN QUESTION, AND OF THE VARIOUS ALLEGED ADVERSE INTERESTS.

A. THE ALLEGED INTEREST OF THE NORTHERN PACIFIC RAILROAD COMPANY CONSISTED OF AN ATTEMPTED INDEMNITY SELECTION UNDER JOINT RESOLUTION OF MAY 31, 1870 (16 STAT., 378), KNOWN AS CROOKSTON LIST NO. 12, FILED OCTOBER 15, 1883.

a. On August 3, 1892, the said selection was unapproved, illegal and informal, and at the present time the selection stands rejected and has no existence as a claim.

October 15, 1883: Crookston List No. 12 filed, the bases in bulk and the selections in bulk, each in a separate list (R. 12). April 19, 1893: The selector for the first time complies with the regulations (R. 12). October 30, 1909: The selection rejected, never having been approved (R. 14).

Crookston Selection List No. 12 was illegal for the reason that the second indemnity limits were not available for alleged losses, such as proffered, which had occurred subsequent to the date of the Act of July 2, 1864 (13 Stat., 365); "The Northern Pacific Land Grant" (19 Opinions of the Attorney General, 88, 90, 91), (8 L. D., 13, 15);

Northern Pacific Railroad Company (18 L. D., 596); Northern Pacific vs. Davis (19 L. D., 87). The specific opinion pronouncing the proffered losses illegal and holding Crookston List No. 12 for rejection is the case of Santa Fe Pacific Railroad Company vs. Northern Pacific Railroad Company (37 L. D., 593, 595). The authority therein cited was the similar case of Northern Pacific vs. Rooney (29 L. D., 242).

Notwithstanding the Secretary's opinion (46 L. D., 7) Crookston Selection List No. 12 *was* on August 3, 1892, informal; that is, it was not in compliance with the regulations; and compliance was important August 3, 1892. The Circular of November 7, 1879 (6 Copp's Land Owner, 141), provided that thereafter lists must be submitted with the selections and the losses arranged "tract for tract":

> Special Circular of May 28, 1883 (12 L. D., 196); Hoeft *et al* vs. St. Paul and Duluth R. R. Company (15 L. D., 101); St. Paul, Minneapolis and Manitoba Railway Company vs. Hastings (13 L. D., 440); Clancey vs. Hastings and Dakota R. R. Company (17 L. D., 592); Oregon and California Railroad Company vs. Small (19 L. D., 422 at 423).

Aside from Circular of November 7, 1879, *supra*, the Department has repeatedly held that the law and fairness to adverse claimants require that the list of selections have the losses arranged "tract for tract" in the same document:

> Northern Pacific Railroad Company vs. Guilford Miller (7 L. D., 100); Iowa Railroad Land Company (9 L. D., 370); Northern Pacific Railroad Company vs. John O. Miller (11 L. D., 1, 428); Southern Minnesota Railway Extension Company (12 L. D., 518); Johnsrud vs. Northern Pacific Railroad Company (13

L. D., 97); St. Paul, etc., Company and St. Paul and Northern Railroad Company (13 L. D., 349, 353); St. Paul Railroad Company vs. Hastings (13 L. D., 440); Hoeft *et al* vs. St. Paul and Duluth Railroad Company (15 L. D., 101); Florida Central and Peninsular Railroad Company (15 L. D., 529); St. Paul, Minneapolis and Manitoba Railroad Company *et al* vs. Munz (17 L. D., 288); Atlantic and Pacific Railroad Company (17 L. D., 313); Northern Pacific Railroad Company (17 L. D., 404); La Bar vs. Northern Pacific Railroad Company (17 L. D., 406); Northern Pacific Railroad Company vs. Larson (19 L. D., 233); Oregon and California Railroad Company vs. Small (19 L. D., 422); Erickson vs. St. Paul, Minneapolis and Manitoba Railroad Company (19 L. D., 423); Northern Pacific Railroad Company vs. Truls Anderson (22 L. D., 57); Grinnell vs. Southern Pacific Railroad Company (22 L. D., 438); State of Washington vs. Northern Pacific Railroad Company (22 L. D., 482); Southern Pacific Railroad Company vs. McKinley (22 L. D., 493); St. Paul, Minneapolis and Manitoba Railroad Company vs. Rowan *et al* (22 L. D., 610); Northern Pacific Railroad Company vs. Drew (23 L. D., 380); Grunewald *et al* vs. Northern Pacific Railroad Company *et al* (24 L. D., 195); St. Paul, Minneapolis and Manitoba Railroad Company vs. Steege *et al* (24 L. D., 453); Northern Pacific Roalroad Company vs. St. Paul, Minneapolis and Manitoba Railroad Company (25 L. D., 67); Northern Pacific Railroad Company vs. Kemp (26 L. D., 17); Northern Pacific Railroad Company vs. Strieb (26 L. D., 589); Hastings and Dakota Railroad Company vs. Pattis (30 L. D., 106).

There was no compliance with the Special Circular of May 28, 1883 (12 L. D., 196):

Northern Pacific Railroad Company vs. John O. Miller (11 L. D., 428); Johnsrud vs. Northern Pacific Railroad Company (13 L. D., 97); St. Paul, Minnea-

polis and Manitoba Railroad Company vs. Munz (17 L. D., 288; Northern Pacific Railroad Company (17 L. D., 404); Northern Pacific Railroad Company vs. Larson (19 L. D., 233); Northern Pacific Railroad Company vs. Anderson (22 L. D., 57); Northern Pacific Railroad Company vs. Drew (23 L. D., 380); Grunewald *et al* vs. Northern Pacific Railroad Company (24 L. D., 195); Northern Pacific Railroad Company vs. St. Paul, Minneapolis and Manitoba Railroad Company (25 L. D., 67); Northern Pacific Railroad Company vs. Strieb (26 L. D., 589).

Since the Department in the case of the Santa Fe Pacific Railroad Company vs. Northern Pacific Railroad Company (37 L. D., 593) held this selection for rejection, it was not only never approved, but was later, on November 30, 1909, rejected (R. 14). It is not now being asserted as a claim.

B. THE IMMIGRATION LAND COMPANY'S ALLEGED INTEREST IS BASED UPON ITS ATTEMPT TO PURCHASE THE LANDS IN QUESTION UNDER SECTION 5 OF THE ACT OF MARCH 3, 1887 (24 STAT. 556), AS EVIDENCED BY ITS APPLICATION FILED WITH THE LAND DEPARTMENT, FEBRUARY 9, 1907, KNOWN AS CROOKSTON 05008.

a. On August 3, 1892, the alleged claim of the Immigration Land Company, and its predecessors, was unexercised and unexercisable.

October 15, 1883: Crookston List No. 12 filed. January 14, 1891: Deed by Northern Pacific to the predecessors of the Immigration Land Company. August 3, 1892: State Grant (27 Stat., 347). February 9, 1907: Immigration Land Company's Application filed (Crookston 05008), now

pending (R. 7-9). October 30, 1909: Indemnity Selection List No. 12 rejected.

From the above statement of facts from the Bill of Complaint (R. 7-14), it will be seen that neither the Immigration Land Company nor its predecessors had, on August 3, 1892, any application on file for the lands under Section 5 of the Act of March 3, 1887 (24 Stat., 556). No application could have been filed on August 3, 1892, or until the railway selection was rejected:

> Instructions of November 22, 1887 (6 L. D., 276); Instructions of February 13, 1889 (8 L. D., 348); Nicholas Cochems (11 L. D., 629); Ida A. Stang (38 L. D., 259).

C. ON AUGUST 3, 1892, THE LANDS IN QUESTION WERE UNRESERVED AND UNSEGREGATED.

Notwithstanding the Secretary's opinion (46 L. D., 7, 13), the lands were neither reserved nor had the unapproved selection list a segregative effect on August 3, 1892.

The law prohibits the withdrawal of indemnity limits of railroads for the benefit of or in aid of indemnity selections. In Northern Pacific vs. Rooney (29 L. D., 242), the Department held that the effect of this was that where an application was filed in conflict with a prior indemnity selection and the illegality of the prior selection was demonstrated, the subsequent application should be allowed. The action in the Rooney case was not different than that taken in this controversy. While Crookston List No. 12 was pending unrejected, the Immigration Land Company on February 9, 1907, filed its present application in conflict therewith. The Commissioner of the General Land Office, notwithstanding the regulations applicable to such applications and notwithstanding the rule of segregation, on Oc-

tober 30, 1909, directed the Register and Receiver to permit the applicants to proceed instead of rejecting the application (R. 7). For precisely the opposite holding with respect to these lands see Santa Fe Pacific Railroad Company vs. Northern Pacific (37 L. D., 593), holding that an unapproved indemnity selection segregated the land from other applications. By segregation a selection of record, defective or valid, "will prevent the receipt or recognition of other applications for the same land, until such selection is disposed of"; Porter vs. Landrum (31 L. D., 352, 353); but in the case of John Ira Eaman vs. C. W. Clarke, Coeur d'Alene 02733, under date of March 26, 1911, the Secretary of the Interior refused to cancel an entry made subsequent to the date of the filing of a selection. Although it was the current rule that a Soldier's Additional Application segregated the land, Frederick Gilbert (35 L. D., 422), the claimant under a rejected Soldier's Additional Application, was unable to demonstrate to the Court that a subsequent conflicting application was not lawfully allowed or that his prior defective application prevented the consideration of the said subsequent application; Robinson vs. Lundrigan (227 U. S., 173).

It would thus appear that where the segregation effect of a defective selection is denied, the selector is deprived of no legal rights. The Department has always held that the rule of segregation of selections is purely administrative and that the Circular of July 14, 1899 (29 L. D., 29), was for the purpose of regulating the receipt of records and not to affect the legality of pending selections:

> Matthews vs. Lines (29 L. D., 178, 179); Young vs. Peck (32 L. D., 102, 104); Hall vs. Oregon (32 L. D., 565); Santa Fe Pacific Railroad Company (33 L. D., 161, 162); California and Oregon Land Com-

pany (33 L. D., 595); Circular of January 10, 1906 (34 L. D., 365); O'Shee vs. La Croix (34 L. D., 437, 438); Santa Fe Pacific vs. Northern Pacific (37 L. D., 593; 669); Todd vs. State of Washington (38 L. D., 165); Instructions (40 L. D., 415, 417).

The case of Guilford Miller shows why the rule of segregation did not prevail in 1892, or to be exact, from September 6, 1887, to July 14, 1899:

July 13, 1885 (12 Copp's Land Owner, 135); the Commissioner of the General Land Office affirmed the action of the Local Land Office in allowing the Miller entry in conflict with an indemnity withdrawal in aid of the Northern Pacific Railroad; also in conflict with an unapproved indemnity selection; holding that the withdrawals were illegal. March 14, 1887 (18 Opinions of the Attorney General, 571); the Attorney General advised the Secretary of the Interior that the withdrawals were legal and that the entry of Miller was illegal. April 28, 1887 (Annual Report of Commissioner for 1887, page 43); President Cleveland advised the Secretary to continue the indemnity withdrawals no longer, and to adjudicate such cases as Miller's "with every intendment in favor of the settler." Circulars and opinions of May 20, 1887 (6 L. D., 77); May 23, 1887 (6 L. D., 82); August 13, 1887 (6 L. D., 84, 91); August 15, 1887, unpublished; and September 6, 1887 (6 L. D., 131) show the procedure by which the Secretary of the Interior proceeded in vacating the indemnity withdrawals and in carrying into effect the President's instructions as to conflicts between prior indemnity selections and subsequent applications under the public land laws. The Commissioner of the General Land Office in his Annual Report for 1887, pages 41-43, and following, comments upon these conflicts adversely to the railroads and gives in detail

the history of the Guilford Miller case; see also Annual Report of the Secretary for 1887, page 9. August 2, 1888 (7 L. D., 100); the Commissioner's opinion in the Guilford Miller case affirmed by the Secretary of the Interior. July 7, 1893 (17 L. D., 8); all pending Motions for Rehearing of the principles of the Miller case denied. All of this must be taken into consideration in the interpretation of the Circular of September 6, 1887.

The Circular of September 6, 1887 (6 L. D., 131):

This circular expressly prohibits the segregation of lands covered by unapproved indemnity selections, and orders Registers and Receivers to receive applications subsequent to such selections, and either to hold such an application suspended subject to the claim of the company, or to permit the applicant to challenge the validity of the prior selection, and to have a hearing with the right of appeal and default.

Contemporaneous with the Circular of September 6, 1887, the Land Department promulgated several circulars indicating a similar policy, all opposite to the modern rule of segregation of selections:

> Decision of August 13, 1887, Atlantic and Pacific Railway Company (6 L. D., 84, 91); Circular of December 15, 1887 (6 L. D., 419); Circular of December 22, 1887 (6 L. D., 456); Decision of May 22, 1891, St. Paul and Sioux City Railroad Company (12 L. D., 541); interpreted by decision in O'Brien vs. Chamberlain (29 L. D., 218, 220).

The authoritative regulations of the Department are binding upon the Department until abrogated; James vs. Germania Iron Company (107 Federal, 597 at 609).

It, therefore, follows that the Circular of September 6, 1887 (6 L. D., 131) was in force until abrogated. The

Departmental cases are unanimous to the effect that the Circular of September 6, 1887, was abrogated by the Circular of July 14, 1899 (29 L. D., 29):

> Santa Fe Railroad Company (33 L. D., 161, 162); Santa Fe Pacific Railroad Company vs. Northern Pacific Railroad Company (37 L. D., 593 at 596); Santa Fe Pacific Railroad Company vs. Northern Pacific Railroad Company (37 L. D., 669 at 671); California and Oregon Land Company (33 L. D., 595); Todd vs. State of Washington (38 L. D., 165).

We could add to this list practically every case holding that a railroad indemnity selection segregated the land, and it would be found that these cases were decided *after* July 14, 1899. Notwithstanding the opinion (46 L. D., 7) practically every case decided *before* July 14, 1899, shows conclusively that an unapproved railway indemnity selection did not have a segregative effect from September 6, 1887, to July 14, 1899. In addition to the groups of cases cited in Chapter II A, *a* page 6 *et seq.*, see the following decisions:

> Counterman vs. Missouri, Kansas and Texas Railroad Company (8 L. D., 237); Southern Pacific Railroad Company vs. Meyer (9 L. D., 250); Missouri, Kansas and Texas Railroad Company vs. Beal (10 L. D., 504); Southern Pacific Railroad Company vs. Barry (11 L. D., 494); Darland vs. Northern Pacific (12 L. D., 195); St. Paul and Sioux City Railroad Company *et al* (12 L. D., 541); St. Paul Company vs. Hastings and Dakota Railroad Company (13 L. D., 440 at 447); Southern Pacific Railroad Company vs. McKinley (22 L. D., 493); Cole vs. Northern Pacific (17 L. D., 8); Burnham vs. Northern Pacific (17 L. D., 584); Clancy vs. Hastings and Dakota Railroad Company (17 L. D., 592); Hastings and Dakota Rail-

way Company (18 L. D., 511); Clark vs. Mansfield (24 L. D., 343); Southern Pacific vs. Davis (26 L. D., 595); Hagen vs. Hastings *et al* (27 L. D., 700); Southern Pacific Railroad Company (28 L. D., 281); Oregon and California Railway Company (28 L. D., 363); Thomas E. Roe (28 L. D., 573); O'Brien vs. Chamberlain (29 L. D., 218); Northern Pacific vs. Rooney (29 L. D., 242).

CHAPTER III.

THE LANDS IN QUESTION WERE NOT EXCEPTED FROM THE OPERATION OF THE ACT OF AUGUST 3, 1892.

A. VESTED RIGHTS ONLY WERE EXCEPTED FROM THE OPERATION OF THE ACT OF AUGUST 3, 1892.

(a). The term "vested rights" as used in statutes means an indefeasible property right; in public land practice, the right to the immediate issuance of a patent.

Where a claimant becomes entitled to the immediate issuance of a patent, it is no longer proper to regard the lands as "lands of the United States" since the very jurisdiction over them, even for taxing purposes which includes the right to destroy, passes to the State; Bothwell vs. Bingham County (237 U. S., 642). Such a right is a vested right; Stimson Land Company vs. Rawson *et al.* (62 Fed., 426, 429):

> "When the right to a patent becomes perfect, the full equitable title passes to the purchaser, with all the benefits, immunities, and burdens of ownership. * * * A contract for the purchase of public land is complete when the certificate of entry has been executed and delivered. * * * A patent certificate protects the

purchaser's rights as fully as a patent. * * * A vested right to a patent for public land is equivalent to a patent issued. * * * The person having such a vested interest being protected by the guaranty contained in the fifth and fourteenth amendments to the Constitution of the United States."

The Commissioner's opinion (R. 32 to 34) is to the effect that a claimant has a vested right under a general public land statute, which confers a privilege only, before he has done what the statute requires of him.

Cooley, cited by the Commissioner, Seventh Edition, page 511, says:

"First, it would seem that a right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws. It must have become a title. * * * The power that authorizes or proposes to give, may always revoke before an interest is perfected in the donee."

Diamond State Iron Company vs. Husbands (68 Atlantic, 240):

In this case, cited also by the Commissioner, the court held that even if the old common law rule was in force that the title of a corporation's real estate upon its expiration did revert to the original grantor, that such a grantor was a mere trustee, compelled to hold the property in trust for the true owner thereof; that he had no "vested right" in the property, and any legislation conveying the property to the proper *cestui*, without the interposition of such a naked trustee, does not deprive him of any vested rights.

Pearsall vs. Great Northern Railway Company (161 U. S., 646):

In this case, also cited by the Commissioner, the Court had under consideration an act of a legislature granting a railroad charter of which Section 17 read:

> "This act is hereby declared to be a public act and may be amended by any subsequent legislative assembly in any manner not destroying or impairing the vested rights of said corporation."

Later the legislature prohibited consolidations. The Court held that the right to consolidate is not a "vested right" but it is a privilege of doing something in the future. This case was quoted from and followed in the similar cases of Bank vs. Tennessee (163 U. S., 416); and Galveston Railroad Company vs. Texas (170 U. S., 226, 240); also for the proposition that the right to accretion is not a vested right but a future right in the case of Western Pacific Railroad Company vs. Southern Pacific Railroad Company (151 Fed., 376). The Court in the Pearsall case on page 673, quoted authoritative definitions of vested rights, not one of them would justify the Commissioner's ruling that the term includes privileges, inchoate rights or expectances under a statute.

Louisville and Nashville Railroad Company vs. Kentucky (161 U. S., 677):

An Act of the State Legislature reads as follows: "Provided that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." Pearsall vs. Great Northern, *supra,* was expressly followed, see pages 694 and 695. The term "vested rights" was again defined in its technical sense.

In re Jerome Avenue in City of New York (105 New York Supplement, 1009):

The term as used in a statute was held to render plain and unambiguous, a provision that might otherwise have been governed by a presumption.

The term as used in statutes received its technical definition in the following cases:

United States vs. Fidelity Trust Company (222 U. S., 158); Field vs. Lewis (118 Ga., 573); Hall vs. Wright (120 Pac., 429); Gates vs. Harris (75 Pac., 243); Gout vs. Townsend (2 Denio, 736); Crutcher vs. Rodman (81 Southwestern, 252); Land Title and Trust Company vs. McCoach (129 Fed., 901, 904); In re Moran's Will (96 Northwestern, 367, 369, 370).

Morton vs. Nebraska (21 Wall., 660):

"When a vested right is spoken of in a statute, it means a right lawfully vested."

B. THE LANDS IN QUESTION WERE NOT EXCEPTED FROM THE OPERATION OF THE GRANT TO THE STATE BECAUSE THE NORTHERN PACIFIC RAILROAD ATTEMPTED TO SELECT THEM.

a. A railway indemnity selection, unapproved, is not a vested right, and is therefore not excepted.

Administrative Ruling (43 L. D., 293); Stalker vs. Oregon Short Line (225 U. S., 142, 149).

b. An exception of vested rights of individuals in a grant to a State is not a ratification of an illegal selection.

Morton vs. Nebraska (21 Wall., 660).

c. The Northern Pacific has no claim to the land.

Even if this were a mere conflict between rival claimants, we have seen that the selection of the Northern Pacific was illegal, informal, and ultimately rejected; therefore, in a simple contest the State would prevail.

d. Since on August 3, 1892, a mere applicant could have filed a subsequent application and have prevailed over the prior selection, Congress was not barred from granting the land for a public purpose.

That a subsequent application on August 3, 1892, would have prevailed over a prior illegal selection, see exactly in point a case in which the prior indemnity selection was illegal because the bases were identical with the bases proffered with Crookston List No. 12; Northern Pacific vs. Rooney (29 L. D., 242). Also see (illegal selection) O'Brien vs. Chamberlain (29 L. D., 218); (informal selection) Northern Pacific vs. John O. Miller (11 L. D., 1 and 428); (informal selection) Hastings and Dakota vs. Pattis (30 L. D., 106); and see numerous cases cited in Chapter II C, page 14, all *contra* to (46 L. D., 7).

e. The selector has no standing in any court.

"Rejection is fatal to any claim * * *"; Osbourn vs. Froyseth (216 U. S., 571).

C. THE LANDS IN QUESTION WERE NOT EXCEPTED FROM THE OPERATION OF THE GRANTING ACT BECAUSE OF THE EFFORT OF THE IMMIGRATION LAND COMPANY TO PURCHASE THEM IN THE INTERIOR DEPARTMENT.

a. The Immigration Land Company never established a claim to the lands.

We have seen that the Immigration Land Company had no right to purchase the lands on August 3, 1892; we have seen that it had no application pending for the purchase of the lands on that date. There was, therefore, no outstanding claim of the Company on August 3, 1892.

b. The Immigration Land Company has no standing in any court.

Even if the State of Minnesota were merely a patentee on August 3, 1892, the Immigration Land Company would at the most only be able to show that when the title passed from the United States, it had a right to purchase the land under Section 5 of the Act of March 3, 1887, *supra*, without being able to show that it had done anything under the Act. This would give it no standing in the courts:

San Jose Land and Water Company vs. San Jose Ranch Company (189 U. S., 177, 181).

c. As the Immigration Land Company sets up its alleged right in opposition to a statute of Congress disposing of the lands it is alleged to have claimed, it must show more than priority; it must show a vested right.

Frisbee vs. Whitney (9 Wall., 187).

d. Under the most favorable view the alleged right of the Immigration Land Company and its predecessors was a mere privilege and not a vested right.

The great bulk of decisions under the Act of March 3, 1887 (24 Stat., 556), Section 5, have to do primarily with the priority of right of one claiming under said section over persons claiming under public land laws. The Stat-

ute also requires a broad construction as to qualifications. The cases, however, point out that this right to purchase while a great privilege, is after all a privilege, and not a title. It follows that the privilege is subject to all of the legal rules regarding privileges, among which is the rule that a privilege or a preference right to purchase or enter public land while unexecuted, is not a vested right:

John Spiers (37 L. D., 100); S. C. (37 L. D., 237):

> "(102) At the same time, the right given by the Act of 1887 was a privilege or opinion to acquire right and title rather than a vested right in the land. It did not touch or affect title that remained complete and unimpaired in the United States. * * * The United States owed him no duty, was under no obligation, but of its free grace offered him a privilege which he might seize upon or not. * * * There are no words of grant in the act. The effective words * * * are simply that—it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands * * *.
>
> "This was a mere privilege and was so held by the court in Ramsey vs. Tacoma Land Company (196 U. S., 360), that—obviously the statute is not a curative one, confirms no title, but simply grants a privilege. * * * That privilege is not one continuing indefinitely, that the land is not held free from entry until the purchaser from the Railroad Company has formally refused to purchase, and that he must act within a reasonable time."

Even in the anomalous case of Clogston vs. Palmer (32 L. D., 77), in reality overruled by John Spiers, *supra*, the opinion reads:

> "(83) The right of purchase conferred by said Section 5 of the Act of March 3, 1887, is not a vested

right. It may be modified or entirely extinguished by Congress while it is in an inchoate condition."

D. THE GENERAL RULES OF CONSTRUCTION OF STATUTES MAKING GRANTS AND RESERVATIONS FOR PUBLIC PURPOSES, SHOW THAT CONGRESS INTENDED TO GRANT THESE LANDS TO THE STATE.

a. The rule of Clogston vs. Palmer (32 L. D., 77) relied upon by the Commissioner, is contrary to the general rule that interests less than vested rights are not excepted from the operation of a grant or reservation for a public purpose.

Clogston vs. Palmer (32 L. D., 77):

"(83) The right to purchase conferred by said Section five of the Act of March 3, 1887, is not a vested right. It may be modified or entirely extinguished by Congress while it is in an inchoate condition. At the time, however, of the enactment of Section twenty-four of the Act of March 3, 1891, the right conferred by Section five of the Act of March 3, 1887, was an existing right, hence the provisions of Section twenty-four should not be construed to affect injuriously or take away such right unless the intention so to do is clearly expressed (Sutherland, Stat., Const., Sec. 481). There is nothing in the Section from which it may be inferred that Congress did intend that the right previously conferred by said Section five should be disturbed."

The Commissioner of the General Land Office applies this rule of construction (R. 32, 33). While we could show that the rule of Clogston vs. Palmer (32 L. D., 77) does not apply to statutes such as the Act of August 3, 1892, *supra*, that contain a full expression of the Congressional

intention in an excepting clause; that the case recognizes that the right under the Act of March 3, 1887, is not a vested right; that the opinion (page 83) is erroneously predicated upon an inapplicable section from Sutherland on Statutory Construction, Section 481 being a portion of the Chapter on "Retroactive Statutes"; and that the case is *dicta* because not predicated upon a complete statement of the facts (37 L. D., 103, 104); we prefer to take the broader ground that the opinion itself is wrong in its statement of the rule to be applied in the construction of such grants and reservations.

The Act of August 3, 1892 (27 Stat., 347), was passed at a time of enlightened public opinion regarding the protection of the sources of rivers and streams. Congress had not only enacted the protective Acts of March 20, 1888 (25 Stat., 526); October 2, 1888 (25 Stat., 960); August 30, 1890 (26 Stat., 391); but also the Act of March 3, 1891 (26 Stat., 1095, 1102), of which Section 24 gave the President the power to create forest reserves for the protection of the headwaters of rivers and streams. This had been urged both by the Land Department and by voluntary organizations in the public interest. See Annual Reports of the Secretary 1890, pages 9 to 14; 1891, page 13; 1892, page 12; *Commissioner's Annual Report for 1890, pages 82 to 84;* and "Progress of Forestry in the United States," by Gifford Pinchot, Agricultural Year Book for 1900, page 294. The American Forestry Association, particularly referred to by Mr. Pinchot, also urged the States to secure from the National Government donations of the public lands at the headwaters of the rivers within the States; Third Resolution, page 10, Proceedings of the Denver Meeting of the American Forestry Association, 1886. The object of securing the Itasca Park Reservation

and Grant was for protecting the sources or ultimate reservoir of the Mississippi (R. 6) in the conviction that such protection was vital; "Preserve the Mississippi," by J. A. Wheelock, "Father of Itasca Park," April 29, 1890, Volume XI, Minnesota Historical Society Papers, page 79.

The grant to the State of Minnesota is controlled by the construction placed by this Court in the Yosemite Park Grant to the State of California:

Hutchings vs. Low (15 Wall., 77):

May 19, 1864; Hutchings made settlement. June 30, 1864 (13 Stat., 325); Congress granted the Yosemite Valley and the Mariposa Group of Big Trees to the State of California for a public park, including therein the land settled upon by Hutchings, who after the grant, declined to yield up possession or to take out a lease. The Park Commissioners brought suit for possession. The Court says:

> "he (Hutchings) asserted and still asserts that he acquired such a vested interest in the premises to the extent of one hundred and sixty acres, that the United States could not transfer their title to the State, or dedicate the land to any public use; * * * The simple question thus presented for determination is: Whether (Hutchings) * * * does thereby acquire such a vested interest in the premises as to deprive Congress of the power to divest it by a grant to another party. If such be the effect * * * it must operate equally to deprive Congress of the power to reserve such lands from sale for public uses of the United States though needed for arsenals, fortifications, lighthouses, hospitals, custom-houses, court houses, or for any other of the numerous public purposes for which property is used by the Government."

This Court, thereupon, held that at the most, Hutchings

had merely a right to be preferred in the purchase of the land if it had ever been opened to purchase. This precisely expresses the interest of the Immigration Land Company under the most favorable view. The ruling of the Court that "vested rights" only are excepted from the operation of great public grants and reservations is now an axiom in the construction of such statutes.

Minnesota vs. Hitchcock (185 U. S., 373):

> "(394) If, for instance, Congress in its adjustment believes that certain lands should be set apart for a public park, or as a reservation for military purposes, or for any other uses, it has the power notwithstanding the provisions of the school-grant section (prior to the time the title to lands actually passed to the State)."

Sierra Ditch and Water Company (38 L. D., 547):

> "(549) When, therefore, Congress placed the lands affected by this right of way within the Yosemite National Park it had full authority to do so, without reference to any inchoate rights which may have been initiated upon these lands under existing legislation."

Sherar vs. Veazie (40 L. D., 549):

> "Congress has the power to withdraw and devote to public purposes any public land under which a vested right has not been secured."

Jefferson Davenport (16 L. D., 526):

> "A preemption filing does not convey a vested interest in the land. * * * The Acts of Congress and the decisions of the Supreme Court have fixed the status of the lands in question (Timber Land Reserve) and this Department is without jurisdiction over the same."

Graham vs. Great Falls Water Power and Townsite Company (76 Pac., 808):

> "So long as title to the public domain remains in the United States, the individual citizen has no privilege therein save such as are granted by the Statute. His right to obtain land under the Federal statutes is a mere bounty extended to him by a generous Government. Until his rights become vested in a specified tract of land, as we shall see, Congress may take from him any privilege * * * it has heretofore extended to him."
>
> "As a reward for prosecuting a contest to a successful completion, Congress gave to the contestant a preferential right, as against other entrymen, to enter the land which had been restored to the public domain through his efforts. * * * So that, unless Congress otherwise disposed of the land embraced in the Campbell entry upon its cancellation, plaintiff had the first right to purchase it."
>
> "But this right was in either case only a right to be preferred over any other claimant. It was the privilege of becoming the first entryman or purchaser of the land. It was not a right which could be enforced against the Government."

Charles O. Deland (36 L. D., 18):

It was held that a Timber and Stone Application under the Act of June 3, 1878 (20 Stat., 89), not completed by proof, payment and issuance of Final Receiver's Receipt and Certificate was not a vested right and was not superior to a subsequent reclamation withdrawal.

Law vs. Utah (29 L. D., 623):

> "(624) The grant to Utah contains no word of exception which would protect or save a preference right

of entry such as is given by the second section of the Act of May 14, 1880 (21 Stat., 140), to successful contestants, and this right, not being a vested one, would therefore have been avoided and extinguished by the grant to the State."

Norton vs. Evans (82 Fed., 804):

"We are unable to agree with this contention. He is in no better position than if he had been allowed by the local land office to make entry. Such an entry creates no vested rights as against the United States, and does not interfere with the power of Congress by subsequent legislation to dispose of the land."

See also:

Russian-American Company vs. United States (199 U. S., 570); Frisbie vs. Whitney (9 Wall., 187); United States vs. Hanson (167 Fed., 881); Nancy C. Yaple (34 L. D., 311); Oregon vs. Frakes (33 L. D., 101, 103); Morrow vs. Oregon (32 L. D., 54, 64); J. M. Longnecker (30 L. D., 611, 612); Naval Reservation (25 L. D., 212); State of Florida (23 L. D., 237 at 240); Instructions (12 L. D., 83); Kaweah Cooperative Colony *et al* (12 L. D., 326); Henry A. Bruns (15 L. D., 170); Josiah Tufts (12 L. D., 438); C. N. Cotton (12 L. D., 205); Frank Burns (10 L. D., 365, 371); James W. Jones (40 L. D., 553); State of Utah (41 L. D., 649, 652); Administrative Ruling (43 L. D., 293); Heirs of Irwin vs. Idaho (38 L. D., 219); August W. Hendrickson (13 L. D., 169); William H. Schmith (30 L. D., 6); Emma H. Pike (32 L. D., 395); W. E. Moses Land Company (34 L. D., 458); State of Washington (36 L. D., 371).

It therefore follows that the rule of Clogston vs. Palmer does not represent the rule of construction of such grants

and reservations; in fact the only subsequent mention of the case is in John Spiers, *supra,* where the case is mentioned only to be characterized as of no binding authority

b. The rule of Andrew J. Billan (36, L. D., 334) does not apply to grants and reservations for public purposes, or to grants that contain an excepting clause.

The Department, in the Billan case (p. 335) eliminates the rule of construction in park grants and reservations, as the case of Hutchings vs. Low, *supra,* by admitting the rule and by denying its application in a subsidy grant. Subsidy grants must be construed most strongly against the grantee; Barden vs. Northern Pacific (154 U. S., 288); Minnesota vs. Hitchcock (185 U. S., 373, 402). It, therefore, follows that the rule of Andrew J. Billan is not in conflict with the rule of Hutchings vs. Low, because it is not applicable to such a controversy as the present.

We think the Commissioner's decision (R. 33), upon the supposed authority of the Billan case, that inchoate rights are *always* excepted from any sort of a grant no matter what language is used in an excepting clause, is not supportable as a legal proposition. Language of a statute is to be followed, not disregarded; Caminetti vs. United States (242 U. S., 470, 485); United States vs. Alamogordo Lumber Company (202 Fed., 700, 706). Where exceptions are expressed, none are implied; Smith vs. Stephens (10 Wall., 321). Furthermore the Secretary in the Billan case, frequently says that express terms must govern, as the opinion, from the outset, contains such expressions as "a presumption of intention to destroy such rights never arises *by implication.*" "In the absence of *express words* * * * "In the absence of *express direction.*" "Subject to the *terms*

of the act." "The *power* of Congress to do all of this is indisputable."

The Billan case is, in reality, an excellent application of the rule, *in pari materia.* The Secretary had before him the question whether a homestead entry is excepted from the operation of one granting clause out of several in the same act and one that had an indemnity provision. The Secretary examined numbers of decisions of this Court and found that under similar circumstances, this Court had never held that Congress had failed to except land reserved by a homestead or preemption entry or cash purchase from the operation of a subsidy grant.

The basic reason is that a homestead entry is reserved by law; Revised Statutes Sections 2289, 2290, 2291 and amendments thereof. A homestead entryman has exclusive possession and an application in conflict is void; Sturr vs. Beck (133 U. S., 541); Holt vs. Murphy (207 U. S., 407). Upon the other hand an indemnity selection such as Crookston No. 12, would not give exclusive possession unless approved; Pacific Livestock Company vs. Isaacs (96 Pac., 460). The law *prohibited* the reservation of the land in aid of indemnity selections; Northern Pacific vs. Guilford Miller (7 L. D., 100). The benefit of segregation is not a legal right, and conflicting applications allowed are not void; Robinson vs. Lundrigan (227 U. S., 173). On August 3, 1892, a selection had no segregative effect; Northern Pacific vs. Rooney (29 L. D., 242).

Since in the case Fullinwider vs. Southern Pacific (229 Fed., 717, 719), it was held that a grant to the Texas Pacific and a grant to the Southern Pacific were not *in pari materia,* although in the same act, because they were different parties and the grants were of different things it

would follow that, not only the rules affecting subsidy grants have no applicability to park grants, but also that the rules affecting the implied exceptions of reserved homestead entries are not applicable to unreserved indemnity selections in conflict with a park grant, particularly since the rule, *in pari materia,* applies only where the law is doubtful not where the law is clear and not where the language of the law follows the ordinary construction of such grants.

It would appear that under no circumstances is the rule of Andrew J. Billan applicable to this controversy notwithstanding R. 21 and 46 L. D. 7.

E. THE DEPARTMENTAL OPINIONS (R. 21; 46 L. D., 7) HOLDING THAT THE LANDS IN QUESTION DID NOT PASS TO THE STATE NOT BEING "UNDISPOSED LANDS OF THE UNITED STATES" ARE PREDICATED UPON IMMATERIAL AND INACCURATE CONCLUSIONS OF LAW (CHAP. II, C, P. 10); THE AUTHORITIES SUSTAIN THE OPPOSITE CONCLUSION. ANY OTHER DEFINITION OF THE LEGAL STATUS OF THE LANDS IN QUESTION THAN "UNDISPOSED LANDS OF THE UNITED STATES" DOES VIOLENCE TO THE OTHER TERMS OF THE ACT. THE GRANTING CLAUSE IS RESIDUARY AND ITS OBJECT WAS TO CONSOLIDATE IN THE STATE THE OWNERSHIP OF THE LANDS IN THE PARK.

By the *proviso* to Section 1 of the Act of August 3, 1892, *supra,* Congress retained as the sole expressed interest of the United States, the right to forfeit the grant; Schulenberg vs. Harriman (21 Wall., 44). By Section 2, Congress excepted vested rights from the operation of the Act of August 3, 1892, *supra.* We have seen that there were no vested rights existing on that date; that neither the

alleged rights of the Immigration Land Company, nor the alleged rights of the Northern Pacific under the most favorable view were vested rights. By Section 1, Congress granted to the State "all of the undisposed lands of the United States" within the Park, naming the subdivisions.

The Commissioner's opinion, as already seen, does violence to the terms of Section 2 by excepting inchoate rights.

Since we have seen that lands to which a vested right has attached, cannot be sold or otherwise disposed of by Congress, the mere fact that the United States is trustee with a bare legal title, does not make the lands "undisposed" lands of the United States. However, the United States *has* a disposable title to lands to which only an inchoate title has attached, since we have seen Congress can dispose of such lands as it chooses. Where a grant excepts inchoate rights, the title of the United States is excepted and upon failure of the inchoate interests the title remains in the United States and does not pass to the grantee; Bardon vs. Northern Pacific (145 U. S., 535).

Since the Secretary of the Interior by his decision, excepts the lands in question because they were covered by alleged inchoate interests his opinion does violence not only to the excepting clause but also to the *proviso* to Section 1. Congress by the *proviso* to Section 1 retains no disposable interest in any land named in the grant.

The Secretary requires the United States to retain a disposable title to the lands in question although Congress provides that no such interest shall be retained by the United States. Although Congress provides no machinery whereby any of the lands in question shall again become part of the public domain except by way of duly authorized forfeiture proceedings, the Secretary attempts to accomplish this by his own procedure.

The Secretary also disregards the terms of the granting clause. Congress granted *"all* of the undisposed lands of the United States." The Secretary interprets the Act so that the State receives "part" of the undisposed lands; the balance being retained by the United States for no public purpose but merely in order that at some future time they may be disposed of to the Immigration Land Company under an original application. The term "dispose" is not a technical term but takes its meaning from the words with which it is used. Here it is defined by the opposite interests named in the Act. All grants are in a sense residuary, Congress excepts certain interests and the grant operates upon the balance of the lands described. A grant includes the lands not expressly excepted, see Central Pacific vs. Valentine (11 L. D., 238, 244) and Burke vs. Southern Pacific (234 U. S., 669, 686). "Undisposed" sometimes means residuum, the meaning here; Stickle vs. Crane (59 N. E., 595, 597).

Since the United States retains no real interest in any of the lands not granted to the State, and since the only lands excepted are alienated lands or lands to which a vested right has been secured, it follows that the grant must operate upon all unalienated or unexcepted lands. The term "dispose" is usually interpreted to mean "alienated" or "parting with":

> (19 Opinions of Comptroller, 826); (20 Opinions of Comptroller, 415, 419); Ham vs. Missouri (18 How., 126); Cooper vs. Roberts (18 How., 173); Menotti vs. Dillon (167 U. S., 703); United States vs. Oregon and California Railroad Company (176 U. S., 28); Beecher vs. Wetherby (95 U. S., 517); United States vs. Northern Pacific Railway Company (152 U. S., 284, 288); Hyde vs. Shine (199 U. S., 62, 82); Koerner vs. Wilkinson (70 S. W., 509); Woodbridge

vs. Jones (67 N. W., 878, 879); Chaney vs. Plumb (48 N. W., 668); in re Hubbell Trust (113 N. W., 512, 515); Mansfield vs. District Association (97 Pac., 150, 151); Ironside vs. Ironside (120 N. W., 414, 416); Goldberry vs. Kidd (58 N. W. 574); Scully vs. Squire (90 Pac., 573).

From the above it will be seen that by a simple and natural construction of the Act of August 3, 1892, *supra*, every part and interest therein harmonizes with every other part. The resultant construction is also in harmony with the overwhelming weight of authority. The opinions (R. 21) and (46 L. D., 7) are not only insupportable by the decisions, but do violence to the terms of the Act.

CHAPTER IV.

THE STATE IS ENTITLED TO THE RELIEF SET FORTH IN THE BILL OF COMPLAINT.

A. THE BILL OF COMPLAINT SHOWS THAT THE TITLE TO THE LANDS HAS PASSED FROM THE UNITED STATES TO MINNESOTA. THE SECRETARY OF THE INTERIOR HAS NO JURISDICTION OVER THEM. HIS EFFORT TO PATENT THEM TO OTHERS IS A WRONG THAT CAN BE ENJOINED. THE SECRETARY CANNOT AVOID THE CONSEQUENCES OF SUCH AN ACTION BY PLEADING THAT THE UNITED STATES AND OTHER PARTIES ARE NOT JOINED OR THAT IT IS A TITLE SUIT.

Lane vs. Watts (234 U. S., 525; 235 U. S., 17):

The plaintiffs filed a bill of complaint against the defendants, the Secretary of Interior and the Commissioner

of the General Land Office, alleging that Congress by the Act of June 21, 1860 (12 Stat., 71) had given the plaintiffs' ancestors the right to select certain lands in lieu of a land grant relinquished. The land was selected and the surveyor general approved the selection which action was approved by the Commissioner of the General Land Office, April 9, 1864. It was asserted and held that this passed the title. Years later a survey of the selected land was made and approved. Thereafter the officials of the Land Department recalled all of the action heretofore taken, required new proofs and directed the Register and Receiver to receive applications under the public land laws. Numbers of such applications were filed. The Land Department also determined that part of the land was withdrawn at the date of the grant and that there were prior grants in conflict therewith.

Thereupon the plaintiffs asked an injunction to restrain the Secretary from allowing further applications and from issuing patents; also for an order requiring the Secretary to file for public record the approved survey plat of the land, as a necessary muniment of title.

We call particular attention to the report of the case (58 Lawyers' Edition of the Supreme Court Reports, 1441-1442), reproducing in part the legal contentions of the defendants, also to the contentions of the defendants in their demurrer to the Bill of Complaint (234 U. S., 536-537). The defendants there raised every point indicated ni the Motion to Dismiss in the case at bar.

> (234 U. S., 525, 540) "The title having passed * * * the title could not be subsequently divested by the officers of the Land Department. * * * An attempt to do so can be enjoined. * * * The suit is one to restrain the appellants from an illegal

act under the color of their office which will cast a cloud upon the title of appellees."

"This disposes of the contentions of appellants that this is a suit against the United States, or one for the recovery of land merely, or that there is a defect of parties, or that the suit is an attempted direct appeal from the Interior Department, or a trial to title to land not situated within the jurisdiction of the court."

(235 U. S., 17, 23), "And in any event the lands in that conflict are not public lands or subject to disposal by the Land Department. * * * But which is the superior claim we can not now consider or decide because the Sonoita claimants are not parties to this cause, and because the question will more properly arise in the local courts, and not in a proceeding * * * against the Secretary of the Interior."

Suits to prevent the clouding of titles are well known:

Lane vs. Watts (234 U. S., 525; 235 U. S., 17); Noble vs. Union River Logging Company (147 U. S., 165); Lehman vs. Roberts (86 N. Y., 232); Strusburgh vs. The Mayor (87 N. Y., 452); Dederer vs. Voorhies (81 N. Y., 153); Remington Paper Company vs. O'Dougherty (81 N. Y., 474); Lawson vs. Mining Company (207 U. S., 1); Piersoll vs. Elliott (6 Pet., 95). See also Ness vs. Fisher (233 U. S., 683, 694); explaining that in Garfield vs. Goldsby (211 U. S., 249) the action was allowed because the Secretary's act "clouded" the right of the relator to a patent; also Ballinger vs. Frost (216 U. S., 240), cited in Lane vs. Watts, *supra*, for the same proposition. Also Santa Fe Pacific Railroad Company vs. Lane (244 U. S., 492, 498) in which the court said that the action of the Secretary "will cast a serious cloud" upon the complaints' right. See also McBride vs. Schurz (102 U. S., 378); United States vs. Lee (106 U. S., 196); Philadelphia Co. vs. Stimson (223 U. S., 605).

CONCLUSION

THE OBJECTIONS IN THE DEFENDANTS' MOTION TO DISMISS SPECIFICALLY ANSWERED.

A. THIS IS NOT A CONTROVERTED TITLE SUIT.

Lane vs. Watts (234 U. S., 525; 235 U. S., 17);
Chesman vs. Cummings (142 Mass., 65);
Diamond State Iron Company vs. Husbands (68 At., 240).

Philadelphia Company vs. Stimson (223 U. S., 605, 622, 623):

> "It is important to observe the precise nature of the suit. It was not to determine a controversy as between conflicting claimants under the local law. It was not to restrain trespass. * * * It was not brought to try the naked question of the title to the land, * * * while the complainant's title lay at the foundation of the suit, and it would be necessary for the complainant to prove it, if denied, still, if its title to the land under water were established or admitted to be as alleged, the question would remain whether the defendant, in imposing restrictions upon the use of the property, was acting by virtue of authority validly conferred by a general Act of Congress. This was the principal question which the complainant sought to have determined. * * * There is no ground upon which it may be denied jurisdiction to decide whether he should be restrained from continuing his opposition to the complainant's plan of improvement."

B. THIS IS NOT A SUIT TO CONTROL THE SECRETARY IN THE PERFORMANCE OF A DUTY WHERE THE TITLE TO THE LAND IS IN THE UNITED STATES AND THE LAW HAS PLACED THE JURISDICTION IN THE SECRETARY OF THE INTERIOR.

In the third assignment of error in the Defendants' Motion to Dismiss (p. 3), two cases are cited, the soundness of which we endorse as strongly as the Defendants; but the said cases apply only where the United States has title to the land and the law has placed the discretionary jurisdiction in the Secretary of the Interior. The cases have no application where the title to the land is not in the United States and the Secretary of the Interior has no jurisdiction. In both Plested vs. Abbey (228 U. S., 42) and in Riverside Oil Company vs. Hitchcock (190 U. S., 316) the recitals in the petitions showed that the title to the land was in the United States; that the regulations attacked were promulgated by the Secretary; and that the allowance of the applications desired were under laws that placed discretionary jurisdiction and exclusive jurisdiction in the Secretary.

C. THIS IS NOT A SUIT TO OBTAIN A DECREE ESTABLISHING THE TITLE OF THE STATE.

In the First assignment of error in the Defendants' Motion to Dismiss (p. 1), appears the following statement:

> "The object of this bill is to obtain a decree establishing the title of the plaintiff State to certain lands and restraining the defendants * * *"

On page 2, there is cited to sustain this and the other points there made, the cases of Louisiana vs. Garfield (211 U. S., 70) and Oregon vs. Hitchcock (202 U. S., 60). We will now consider only whether under the decisions of this Court this action is a Bill "to obtain a decree establishing the title of the plaintiff State to certain lands."

The Defendants' Motion to Dismiss correctly describes such an action as Louisiana vs. Garfield, *supra*, as a bill "to obtain a decree." Literally in every action described by this Court as a "bill to establish title" the plaintiff in his prayers for relief asks specifically for a decree or decrees, or for a judgment that will recite therein that the title to the lands has passed from the United States to the plaintiff. In other words the Court is asked by its decree to *create* a muniment of title.

Oregon vs. Hitchcock (202 U. S., 59, 61):

The Court says that the plaintiff asks a decree "establishing the title of the State" to certain alleged swamp lands.

New Mexico vs. Lane (243 U. S., 52):

> (57) "It is prayed * * * that it be decreed that the title immediately vested in the Territory of New Mexico at the date of the Act of June 21, 1898, and has become vested in the State as the successor of the Territory; that the Secretary and Commissioner have not had since the date of the Act or now have authority to interfere with the State's title and that they may be enjoined from executing their orders and decisions."

Louisiana vs. Garfield (211 U. S., 70):

In the prayers for relief in the bill of complaint Louisiana

asks that the Court "will adjudge and decree that the lands were granted * * *". (prayer 3) "that the approval * * * vested *eo instanti* * * * the fee simple title" (in the State), (prayer 4) "that such fee simple title having so vested * * * it was not * * * within the power of the Secretary * * *" (to recall that approval). Such prayers make the suit (page 74) "a bill to establish title."

The Court uses the characterization "bill to establish title" sparingly only to such cases as the last three. In each case the State presented to the Court its own side of a disputed controversy of law and fact in which the Interior Department had decided against the State. Upon such a recital the State asked the Court not only for decrees to prevent the Secretary from administering the land according to the land laws, but also for decrees establishing a title upon which to predicate the injunction to restrain the Secretary. In other words, the State shows and admits that it has not the muniment of title upon which to predicate the action against the Secretary and that the *prima facia* title is not in the State, so it asks for a decree in the form of a muniment of title that in turn will convince the Court that the administration of the land laws by the Secretary, should forever be terminated. This is asking the Court to substitute its own decree evidencing the severing of the title of the United States, in the place of the muniment of title provided by Congress.

The case at bar is not a "bill to establish title" for the reason that Minnesota does not ask this Court to decree to it a muniment of title in its prayers for relief.

D. NEITHER THE UNITED STATES NOR THE IMMIGRATION LAND COMPANY ARE NECESSARY PARTIES.

The Defendants (p. 2) also cite the cases of Oregon vs. Hitchcock (202 U. S., 60) and Louisiana vs. Garfield (211 U. S., 70) to the effect that the United States is a necessary party to this action. These cases have just been discussed to show that because the plaintiff States asked the Court to decree them muniments of title, the cases are "bills to establish title." In the case of Oregon vs. Hitchcock, *supra*, the Court pointed out that the title to the land was in the United States and that therefore the United States was a necessary party. In the Louisiana case the State claimed under an Act of Congress which required administration by the Land Department, and which also required the issuance of a muniment before the title of the United States was severed. The State could not exhibit an undisputed muniment of title showing that the title of the United States to the land had been severed. It thereupon asked this Court by a decree to create evidence that the Federal title was severed. It would follow that in such an action affecting the title to the land that the United States is a necessary party, particularly in one that would give the State such an undisputed muniment of title that the Secretary of the Interior could be enjoined from acting under the claimed federal title. It follows that since the relief sought by Louisiana and Oregon consisted of decrees that in effect if granted, would be muniments of title anywhere, it would be unjust to the United States to render such a decree unless the United States were joined.

Lane vs. Hoglund (244 U. S., 174):

The question was as to the Secretary's jurisdiction under the proviso to Section 7 of the Act of March 3, 1891 (26 Stat., 1095, 1099). The case is interesting because the Secretary (61 Lawyers' Edition 1066) argued that the

Court is without jurisdiction because the title to the land is in the United States; and that since the suit affects its property, the United States is a necessary party. The rule is, however, that where the jurisdiction of the Secretary is the real issue, the Court's jurisdiction is not defeated by a contention that the suit affects titles.

Minnesota vs. Northern Securities Company (184 U. S., 199);

California vs. Southern Pacific (157 U. S., 225):

These cases may be cited to the effect that if this were a controversy relating to the passing of, clearing of, *or the establishment of title,* the Immigration Land Company, a Minnesota Corporation, would have to be joined. But in Lane vs. Watts (235 U. S., 17, 22) it was pointed out that exact questions of adverse ownership were not involved where the plaintiff shows a *prima facia* title in a suit to enjoin the clouding of titles, the only question being whether the Secretary of the Interior, after title has passed from the United States, had the right to issue patents for the same lands. *Alleged* adverse parties were not indispensable parties in such a suit.

As shown the Immigration Land Company has no claim except for unpatented and ungranted public lands of the United States. Unless the United States is a necessary party the Immigration Land Company is not.

The entire matter is settled by the fact that the Secretary of the Interior is about to commit a wrong to the plaintiff State; that is, he is about to create a substantial cloud upon its title. Having no jurisdiction to do the act which he seeks to do, it is immaterial that he alleges that he believes that the Immigration Land Company, by reason of its belated application filed under the public land laws,

is entitled to the land or that he believes the title is in the United States.

Therefore, he alone is properly made a defendant. To show that the United States and the Immigration Land Company are necessary parties the defendants must show that the title to the land is still in the United States.

E.. NO MONEY OR MONEY CLAIM IS INVOLVED IN THIS SUIT.

In the Motion to Dismiss (page 2), the Defendants contend that this suit will affect the title to the money paid the United States Receiver at Crookston, February 10, 1910. This money has not been disbursed as "earned" money received for the sale of public lands, because patent has not issued; the reason being that there are Acts of Congress requiring the return of such money if the intending purchaser does not get title (20 Opinions Comptroller, 415). Since the United States had not title to the land when the payment took place, the Immigration Land Company may apply for and receive a refund thereof. The State of Minnesota does not demand this money or any action with reference to it.

THE STATE OF MINNESOTA,

By LYNDON A. SMITH,
Attorney General, and

CLIFFORD L. HILTON,
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St. Paul, Minnesota.

CHARLES R. PIERCE,
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Washington, D. C.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

STATE OF MINNESOTA, PLAINTIFF,
v.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR OF THE UNITED STATES, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE UNITED STATES, DEFENDANTS.

No. 26, Original.

MOTION TO DISMISS WITH CITATIONS OF AUTHORITIES.

Now come the above named defendants and move that the bill of complaint herein be dismissed for the following reasons:

First. The court is without jurisdiction to entertain this suit because it is in substance and effect against the United States, which has not consented to be sued or waived its immunity from suit.

The object of the bill is to obtain a decree establishing the title of the plaintiff State to certain lands, and restraining the defendants as officers of the Land Department of the United States from consummating a sale of such lands under the act of March 3, 1887 (24 Stat. 556). Such decree would not affect

any pecuniary interest of the officers named as defendants but would bind the United States and determine its right to the purchase price of the lands in question. (See *Oregon* v. *Hitchcock*, 202 U. S. 60, 68; *Louisiana* v. *Garfield*, 211 U. S. 70, 77.)

Second. There is a defect of parties defendant which can not be cured without depriving the court of jurisdiction.

The bill seeks a decree restraining the defendants as officers of the Land Department from issuing a patent to lands purchased from the United States under the act of March 3, 1887 (24 Stat. 556), by the Immigration Land Company, a corporation and citizen of the plaintiff State. Such decree would in effect determine the rights of the Immigration Land Company to the land in question in its absence, and the company being a citizen of the plaintiff State, it can not be joined without depriving the court of its constitutional jurisdiction over the cause. (See *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235, 247; *California* v. *Southern Pacific Co.*, 157 U. S. 225, 257–262.)

Third. The relief prayed for would be an invasion of the lawful jurisdiction of the defendants as officers of the Land Department.

The bill shows the following:

On December 26, 1871 (R. 11), an area embracing the lands in question was withdrawn by the Land Department in aid of indemnity selections of the Northern Pacific Railroad Company under the grant

of July 2, 1864 (13 Stat. 365), amended May 31, 1870, 16 Stat. 378.

On October 15, 1883 (R. 12, 22), the railroad company filed in the Land Department a list of indemnity selections within this withdrawn area, and on January 14, 1891 (R. 10, 26), the company conveyed a portion of such selected lands, including the lands in question, to the grantors of the Immigration Land Company. This list of selections was canceled October 30, 1909 (R. 14, 23), because of the failure of the railroad company to perfect them.

On February 9, 1907 (R. 7, 21) the land company applied to the Land Department to purchase the lands in question under the act of March 3, 1887, 24 Stat. 556, which authorizes patents to be issued to *bona fide* purchasers from a railroad company of lands, within the limits of its grant from the United States, to which the company did not secure title, upon payment by such purchasers to the United States of the ordinary Government price for like lands. The plaintiff State protested this application (R. 8, 25), claiming the lands under the act of August 3, 1892, 27 Stat. 347, which granted to the State for park purposes "all undisposed lands of the United States" within a large area, embracing the lands in question, saving all existing "vested rights" in respect to any of said lands.

After a full hearing of the claims of both parties the Commissioner of the General Land Office decided the questions of fact and law in favor of the land company and against the State. (R. 8–9, 21–35.)

The Secretary of the Interior, after a further hearing, affirmed the Commissioner's decision, and thereafter denied a motion of the State for a rehearing. (R. 9.) Thereupon, and before issuance of the patent provided for in the act of 1887, the State brought this suit to restrain the Secretary and the Commissioner from taking any further action in the matter. (R. 15–17.)

This decision of the Secretary and the Commissioner, determining various questions of law and fact, made in the discharge of a duty imposed upon them by law and involving the exercise of judgment and discretion, can not be controlled by injunction. (See *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 323–325; *Plested* v. *Abbey*, 228 U. S. 42, 51, and cases cited.)

Fourth. The bill of complaint does not state facts sufficient to entitle the State of Minnesota to any relief.

Wherefore the defendants respectfully pray that the bill of complaint herein be dismissed and that they be allowed their costs and charges in this behalf sustained.

JOHN W. DAVIS,
Solicitor General.
FRANCIS J. KEARFUL,
Of Counsel.

MARCH, 1917.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

STATE OF MINNESOTA, *Plaintiff*, *v.* FRANKLIN K. LANE, Secretary of the Interior of the United States, and CLAY TALLMAN, Commissioner of the General Land Office of the United States, *Defendants*.	Original No. 20. In equity.

BRIEF FOR THE DEFENDANTS IN SUPPORT OF MOTION TO DISMISS.

STATEMENT.

By its bill of complaint in this court the State of Minnesota seeks to establish its title to 1,616.49 acres of land in Minnesota and to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from issuing a patent for the land to the Immigration Land Company, a corporation of Minnesota.

The Immigration Land Company made application to the Land Department on February 9, 1907, to purchase the land under section 5 of the act of March 3, 1887, 24 Stat. 556, 557. That act gave a right to a patent upon payment of the ordinary Government

price to a bona fide purchaser from a railroad company and to the heirs and assigns of such purchaser of lands sold by the railroad company as a part of its grant, but "not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company."

The State of Minnesota on March 5, 1912, by telegram, and on March 18, 1912, by formal instrument, protested against the issuance of patent to the Land Company, asserting its ownership of the land under the act of August 3, 1892, 27 Stat. 347. That act granted to the State "all undisposed lands of the United States situated in" thirty-five designated sections (22,400 acres) embracing the land in question (1,616.49 acres), for a "public State park," subject to the following additional exception:

> That this act shall not in any manner whatsoever interfere with, supersede, suspend, modify, or annul the vested rights of any person, company, or corporation in respect to any of said lands existing at the date of the passage of this act.

After a full hearing the Commissioner of the General Land Office on January 26, 1915, decided in favor of the Land Company. His decision is attached to the bill as Exhibit A. (See par. 7.) This decision was reviewed and affirmed by the Secretary of the Interior on June 29, 1916, and a motion for rehearing

by the State was denied by the Secretary on September 30, 1916. *State of Minnesota* v. *Immigration Land Co.*, 46 L. D. 7, 14.

The facts upon which the Land Department acted are shown in the bill. Omitting superfluous adjectives and conclusions, they are as follows:

The lands in controversy are in odd-numbered sections (par. 4) within the second indemnity limits of the grant to the Northern Pacific Railroad Company, act of July 2, 1864, section 3, 13 Stat. 365, 367, as supplemented by the act of May 31, 1870, 16 Stat. 378 (par. 11).

December 26, 1871, the lands within the established indemnity limits were withdrawn from entry and settlement in aid of indemnity selections, released from the withdrawal September 6, 1887, and not since withdrawn (par. 12).

October 15, 1888, the railroad company filed a list of indemnity selections embracing the lands in question, giving as bases therefor lands exempted from its grant by reason of a subsisting withdrawal in aid of the grant by act of May 5, 1864, 13 Stat. 64, for construction of the Lake Superior & Mississippi Railroad (par. 13). The base lands and selected lands were of approximately equal area (par. 14). The bases and selections were not set forth tract for tract but in bulk as to both (par. 15), but they were so set forth by a "rearranged selection list" filed April 19, 1893 (par. 16).

By deeds dated January 14, 1891, the railroad company conveyed the land in question to Frederick

Weyerhaeuser and others, who organized the Immigration Land Company, July 15, 1898, and conveyed the lands to it by deeds dated October 1, 1898, and January 31, 1907 (par. 9).

The indemnity selection list with respect to the lands in question was never approved (par. 18). Subsequently to August 3, 1892, the date of the grant to the State, various proceedings were had without notice to the State "looking to the correction" of the list, "including the filing of said rearranged list on April 19, 1893, and including several attempts to substitute other bases." The list remained of record until it was "finally rejected and the records cleared therefrom on October 30, 1909" (par. 20).

February 9, 1907, the Immigration Land Company filed its application in the local land office at Crookston, Minnesota, for a patent to the lands in question (par. 4), under section 5 of the act of March 3, 1887, 24 Stat. 556 (par. 8). Acting under instructions from the Commissioner of the General Land Office issued October 30, 1909, the local land officers permitted the applicant to make proof and pay the Government price, $1.25 per acre, which was done, and receipt thereon was issued February 10, 1910 (par. 5).

March 5, 1912, the State protested against the action taken and thereafter prosecuted the case vigorously and exhaustively both before the Commissioner and the Secretary (par. 6), who decided that the patent should issue to the Land Company (par. 7).

The Commissioner's decision, attached to the bill, and not disputed as to matters of fact, contains the following statement (bill, page 31):

> The qualifications of the grantees are not questioned, nor is the good faith of the purchase an issue. All subsequent purchasers, including the applicant, were bona fide purchasers for valuable consideration and are citizens of the United States or a corporation in the State of Minnesota.
>
> It appears from the record in the case, that for the years from 1891 to 1912, inclusive, the State of Minnesota levied taxes upon all the lands involved, and that such taxes have been paid to the amount of $4,762.50, and that taxes were levied for the year 1913. This fact is only a circumstance and not a vital issue in the case.
>
> These particular lands were under the control of and in possession of the grantees of the Northern Pacific Railway Company on August 3, 1892, and have remained in open and actual possession of such grantees ever since. (*Hunt* v. *Maxwell*, 23 L. D. 180.)

As grounds for equitable relief, the bill avers that the defendants intend to issue a patent "in professed accordance with the laws of the United States" to the Land Company for the land in controversy (par. 23), and that such action "will cloud the title of the State of Minnesota to the lands hereinbefore described and necessitate divers suits to remove such cloud and will also subject the State of Minnesota to a multiplicity of suits to quiet title to other

lands whose status and title will of necessity be affected by the principle contended for in the decisions referred to" (par. 24).

The prayer of the bill is for a decree restraining the Secretary and Commissioner from "proceeding in any manner with the proceedings in the matter of the pretended application to purchase of the Immigration Land Company," and requiring those officers to cancel and expunge from their records "the instructions, orders, receipts, certificates, and the approvals issued in the matter of the Immigration Land Company's application" (p. 17).

GROUNDS OF THE MOTION TO DISMISS.

1. The court is without jurisdiction to entertain this suit because it is in substance and effect against the United States, which has not consented to be sued or waived its immunity from suit.

2. There is a defect of parties defendant which can not be cured without depriving the court of jurisdiction.

3. The relief prayed for would be an invasion of the lawful jurisdiction of the defendants as officers of the Land Department.

4. The bill of complaint does not state facts sufficient to entitle the State of Minnesota to any relief.

The motion to dismiss contained a brief statement of the case and citation of authorities. Counsel for the State have filed an elaborate brief and invite a full discussion of the merits.

PROPOSITIONS SUBMITTED.

1. The suit can not be maintained unless the State's claim of title is so clear as not to admit of argument to the contrary.

2. The decision of the Land Department in favor of the Immigration Land Company was right.

ARGUMENT.

I.

The suit can not be maintained unless the State's claim of title is so clear as not to admit of argument to the contrary.

1. *The United States a real party in interest.*

The decree sought by the State would not affect any pecuniary interest of the officers of the Land Department who are made defendants, but it would in effect bind the United States and determine its right to the purchase price of the lands in question. Such a determination can not be made in the absence of the United States as a party unless it can be said that there is no room for argument in opposition to the claim of title asserted by the State.

In *Oregon* v. *Hitchcock*, 202 U. S. 60, the State of Oregon, asserting title under the Swamp Land Act, sought to restrain the officers of the Land Department from allotting and patenting swamp land in an Indian reservation. The bill was dismissed, and the court by Mr. Justice Brewer said (p. 68):

> While the nominal defendants are citizens of a State other than Oregon, yet they have

> no interest whatever in the controversy, and if a decree be rendered against them in favor of the State it will not affect their interests but bind and determine the rights of the United States, the real, substantial defendant.

In *Louisiana* v. *Garfield*, 211 U. S. 70, a military reservation established in 1838 was abandoned in 1871. In 1895 the Secretary of the Interior approved a list of swamp lands presented by the State in conformity to the Swamp Land Act of 1849. In 1904 the Secretary ordered the approval of 1895 to be vacated and the lands to be held for disposition by the Department on the ground that they were excepted from the grant because at that time embraced in a military reservation. The State sued to enjoin the Secretary and Commissioner from carrying out this order. The bill was dismissed, and the court by Mr. Justice Holmes said (p. 75):

> We will assume for purposes of decision that if the United States clearly had no title to the land in controversy we should have jurisdiction to entertain this suit.

It was then observed that the approval of the swamp-land list had proceeded upon a mistake of law and was therefore void, but that it might be held to have been validated by the Limitation Act of 1891. As to this, however, a doubt existed as to whether the Limitation Act "applies to approvals when they are given the effect of patents as well as to patents, which alone are named." The existence of this doubt as to the title of the State was held to be

an insuperable obstacle to the maintenance of the bill. It was said (p. 77):

> The doubt is whether Louisiana has not now a good title by the lapse of five years since the approval and by the operation of that act.
>
> But that doubt can not be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard. The United States fairly might argue that the statute of limitations was confined to patents, or was excluded by the act of 1871. If it yielded those points it still reasonably might maintain that a title could not be acquired under the statute by a mere void approval on paper, if the United States ever since had been in possession claiming title, as it claimed it earlier by the act of 1871. It might argue that, for equitable relief on the ground of title in the plaintiff, in the teeth of the last-named act, it would be necessary at least to allege that the State took and has held possession under the void grant. The United States might and undoubtedly would deny the fact of such possession, and that fact can not be tried behind its back. It follows that the United States is a necessary party and that we have no jurisdiction of this suit.

In *New Mexico* v. *Lane*, 243 U. S. 52, the State of New Mexico, asserting title to a certain 16th section under its school grant of June 21, 1898, brought its bill to enjoin the Secretary and Commissioner from issuing a patent to one Keepers under the coal land law upon an application to purchase in 1911. The school

grant excepted mineral land, and the question was whether at the date of the grant the land was known coal land. The bill showed that the State had contested Keepers's application in the Land Department, that the decision awarding the land to the applicant did not find the known coal character at the date of the granting act, and that the facts found would not under the law as then construed and interpreted have rendered the land known coal land. There was a motion to dismiss on the ground that the United States was a real party in interest inasmuch as if the injunction should issue it "would be deprived of the purchase price of the land," and the motion was granted upon the authority of *Louisiana* v. *Garfield*.

2. *The Immigration Land Company an indispensable party.*

It may be admitted that if the officers of the Land Department were threatening to issue a patent to the Land Company for land which concededly had been granted to the State, such action could be enjoined without the presence of the Land Company as a party. But this clearly is not such a case. As presented by the State there is a very real controversy between the State and the Land Company claiming, respectively, under the granting act of 1892 and the adjustment act of 1887, a controversy which has been decided in favor of the Company by the Land Department, and which decision this court is asked to reverse.

The Land Company is a corporation and citizen of the State of Minnesota, and it can not be joined for

the purpose of determining the controversy between it and the State without depriving this court of its constitutional jurisdiction over the cause. *California* v. *Southern Pacific Co.*, 157 U. S. 229, 257–262; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235, 246; *New Mexico* v. *Lane*, 243 U. S. 52, 58.

The indispensibility of the Land Company as a party is well illustrated by *Litchfield* v. *Register and Receiver*, 9 Wall. 575. That was a suit to enjoin local land officers in Iowa from entertaining and acting upon applications to preempt certain lands claimed by the plaintiff as grantee of the State, which claimed under various acts of Congress. A decree dismissing the bill was affirmed, and the court, by Mr. Justice, Miller, said (p. 578):

> Another objection, equally fatal to the bill, is the want of necessary parties.
>
> It appears on its face that the register and receiver have no real interest in the matter, but that persons not named are asserting before them the legal right to preempt these lands. These persons are the real parties whose interests are to be affected and whose claim of right is adverse to plaintiff. If the court should hear the case, and enjoin perpetually the register and receiver from entertaining their applications, they have no further remedy. That is the initial point of establishing their right, and in this mode a valuable and recognized right may be wholly defeated and destroyed without the possibility of a hearing on the part of the party interested. This is not a case in which the land officers represent

these claimants. They have no such duty to perform. They might let the injunction be issued without defense, and thus a proceeding almost *ex parte* be made to strangle the incipient right of the actual settler on the public lands. If it can be done in this case, it can be done in every other in which a plaintiff is willing to proceed against the officers, without bringing the settler on the land before the court.

It is difficult to regard the present bill otherwise than as an effort on the part of the State of Minnesota "to strangle the incipient right" of the Immigration Land Company in its absence.

3. *Jurisdiction of the land department.*

By the application of the Land Company for a patent to the land under section 5 of the act of March 3, 1887, the jurisdiction of the Land Department under that act was invoked, and it became necessary to determine whether the applicant was within its provisions. This involved a construction of those provisions and their application to the facts. In the performance of these functions the right claimed by the applicant, which originated in 1891, was found to be valid and complete.

When the State protested against the Land Company's application, claiming that the land had been granted to it by the act of August 3, 1892, it became necessary to determine whether that act extinguished the prior right of the Land Company or whether it saved that right. This involved a con-

struction and application of the act of 1892. Construing this act in the light of all the facts and the circumstances surrounding its enactment, the Land Department decided that the prior right of the Land Company remained unaffected.

Such a decision involves the exercise of judgment and discretion; it is one made in the discharge of a duty imposed by law; and it can not be controlled by injunction. We shall attempt to show presently that this decision was clearly right. It is enough, however, to sustain this objection, that it was not clearly wrong.

In *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324, the court by Mr. Justice Peckham said:

> That the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would

> require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility as well as the power rests with the Secretary, uncontrolled by the courts.

In *Ness* v. *Fisher*, 223 U. S. 683, the court was asked to control by writ of mandamus a decision of the Secretary of the Interior with respect to the construction of a statute which it was his duty to administer, and as to which "there was room for difference of opinion as to the true construction." The writ was denied, the court by Mr. Justice Van Devanter saying (p. 691):

> So, at the outset we are confronted with the question, not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge

of a duty imposed by law and involving the exercise of judgment and discretion, may be reviewed by mandamus and he be compelled to retract it, and to give effect to another not his own and not having his approval. The question is not new, but has been often considered by this court and uniformly answered in the negative. *Decatur* v. *Paulding*, 14 Pet. 497, 515; *United States ex rel. Tucker* v. *Seaman*, 17 How. 225, 230; *Gaines* v. *Thompson*, 7 Wall. 347; *Litchfield* v. *Register and Receiver*, 9 Wall. 575; *United States ex rel. McBride* v. *Schurz*, 102 U. S. 378; *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, 48; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324.

In *Litchfield* v. *Register and Receiver*, 9 Wall. 575, the plaintiff sought by injunction to prevent action upon applications to preempt certain lands, averring that he owned the lands by conveyance from the State of Iowa, to which they had been granted by Congress, and that they were not public lands subject to disposition by the Land Department. Affirming a decree dismissing the bill, the court by Mr. Justice Miller said (p. 577):

The very first duty which the register is called on to perform, when an application is made to him to enter a tract of land, is to ascertain whether it is subject to entry. This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? Has it been reserved by any action of Congress, or of the proper department? Has it been granted by any act of Congress, or has

it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion. The bill shows on its face that these officers, in the exercise of this duty, were considering whether the reservations of the departments and the acts of Congress, and the claim of the plaintiff under them, took these lands out of the category of lands subject to sale and preemption, and he asks the court to interfere by injunction to prevent them from determining that question, and that the court shall determine it for them. He says the court below erred because it did not require them to come in and answer to his claim of title, and at their own expense to put the court in possession of their views, and defend their instructions from the commissioner, and convert the contest before the Land Department into one before the court. This is precisely what this court has decided that no court shall do. After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded, he may seek redress in the courts. He insists that he now has the legal title. If the Land Department finally decides in his favor, he is not injured. If they give patents to the applicants for preemption the courts can then in the appropriate proceeding determine who has the better title or right. To interfere now is to take from the officers of the Land Department the functions which the law confides to them and exercise them by the court.

So in this case the question, whether the land in controversy had been granted to the State by the act of 1892 or whether that grant was subject to the prior existing right of the Land Company under the act of 1887, was one the decision of which called for the exercise of judgment and discretion. The bill shows on its face that the Secretary and Commissioner, in the exercise of their plain duty, have considered and decided this question after a full hearing, and this court is now asked to compel them to retract their decision and to give effect to another and contrary one. Before the case has been finally determined by the issuance of patent, before the officers of the Land Department have lost jurisdiction, this court is asked to determine the case for them—to convert the contest before the Land Department into one before the court. After the contest shall have been disposed of by issuance of the patent, if any right of the State has been invaded it may seek redress in the courts. The State insists that it now has the title. After the patent has issued to the Land Company, the courts can then in an appropriate proceeding determine who has the better title. To interfere now would be to usurp the functions confided by law to the officers of the Land Department.

II.

The decision of the Land Department in favor of the Immigration Land Company was right.

1. *The claim of the Land Company under the Act of 1887.*

The act of March 3, 1887 (24 Stat. 556), for the adjustment of grants made to railroad companies, provided in section 5:

> That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the preemption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said preemption

and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which land the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

The lands in question are odd-numbered sections within the indemnity limits of the grant to the Northern Pacific Railroad Company and coterminous with the constructed road. They were embraced in a list of selections filed October 15, 1883, by the Northern Pacific Railway Company, successor of the Railroad Company. They were sold and conveyed by the Railway Company on January 14, 1891, as a part of its grant, to Frederick Weyerhaeuser and others, citizens of the United States and bona fide purchasers, who conveyed them to the Immigration Land Company, a corporation of Minnesota and a bona fide purchaser. The lands were never conveyed to the Railway Company, and the selections, as to these lands, were canceled October 30, 1909. Upon these facts, the right of the Land Company, given by section 5 of the act of March 3, 1887, to a patent from the United States on payment of the ordinary government price is perfect.

In *United States* v. *Southern Pacific R'd Co.*, 184 U. S. 49, the court was called upon to consider the rights of purchasers from the railroad company of lands both patented and unpatented to which the title claimed by the company had failed. The purchasers of patented land relied upon the act of March 2, 1896, 29 Stat. 42, and the purchasers of unpatented land relied upon the act of March 3, 1887, 24 Stat. 556. Referring to both acts the court by Mr. Justice Brewer said (p. 52):

> These acts were passed for the purpose of upholding the titles of parties who in good faith had purchased from railroad companies lands, which though supposed to be part of their grants, proved not to be so.

The facts which conditioned the right were held to be the same under both acts. As to patented lands, they were stated as follows (p. 53):

> In the present case the deeds to the patented lands were executed by the company at different dates, commencing July 23, 1885, and ending July 19, 1892. These lands were apparently within the grant made to the Southern Pacific by the act of March 3, 1871, c. 122, 16 Stat. 573; that is, they were public lands in the statutory sense of the term along the line of the Southern Pacific as authorized by that act and within the place or indemnity limits of the grant. The road had been constructed, and the Land Department of the United States, the tribunal charged with the

duty of administering the public lands, had decided that the company had earned the lands and had caused patents therefor to be issued to it. No third party claimed title; either the Government or the company was the owner. Under those circumstances the purchasers bought the lands; bought them in good faith; paid value for them.

And as to unpatented lands, it was said (p. 55):

With reference to the unpatented lands, they, like the former, were so situated with respect to the constructed road of the Southern Pacific as to be apparently within the scope of its grant, and the same general comments are appropriate here as in reference to the patented land. The act of 1896 refers only to lands patented or certified, and the parties who contracted with the company for unpatented lands must rely for protection upon the act of 1887. Most of the transactions in respect to them were after the date of this act, and it is contended that it is not prospective in its operation and only purports to protect prior transactions.

Upon a consideration of the rulings of the Land Department and the language of the act of 1887, it was held to apply "not merely to transactions had before its date, but to any had before the time of final adjustment." In this connection the remedial character of the statute was considered, and it was said (p. 56):

Further, it must be borne in mind that this is a remedial statute, and is to be construed

liberally, and so as to effectuate the purpose of Congress and secure the relief which was designed.

The following extract from an opinion by Attorney General Garland rendered in 1887 soon after the passage of the Act was quoted approvingly (p. 57):

> The whole scope of the law from the second to the sixth section, inclusive, is remedial. Its intent is to relieve from loss settlers and bona fide purchasers who, through the erroneous or wrongful disposition of the lands in the grants, by the officers of the Government, or by the railroads, have lost their rights or acquired equities. * * * The fifth section expressly refers to such lands as had been sold, which had not been conveyed "to or for the use of such companies." It is not required that the sale by the railroad companies shall have been made on its part in good faith, but only that the purchaser shall have bought in good faith. That it was sold under a claim of the grant to another in good faith is the ground of his equity.

Finally, it was held, conformably to rulings of the Land Department, with respect to a claimant not an immediate purchaser from the railroad company (p. 58):

> If he is a bona fide purchaser of the land and has the required qualifications as to citizenship, he is within the intendment of the statute, and if he be not the original purchaser from the company it is immaterial what the qualifications of his immediate grantor, or the intervening purchasers, may have been.

In *Gertgens* v. *O'Connor*, 191 U. S. 237, the Land Department had issued a patent under section 5 of the Act of 1887, after a contest between the applicant and a settler. A judgment of ejectment founded on the patent was sustained. The situation at the time of the purchase from the railroad company was very like that in the case at bar. In the statement of the case the court by Mr. Justice Brewer said (p. 238):

> The tract was surveyed public land, situate in the county of Traverse, and lying within the twenty-mile indemnity limits of the grant to the St. Paul, Minneapolis and Manitoba Railway Company, as defined by acts of Congress dated, respectively, March 3, 1857, 11 Stat. 195, c. 99, and March 3, 1865, 13 Stat. 526, c. 105. It, with other lands, was withdrawn from settlement and entry under the land laws of the United States by executive withdrawal, dated May 25, 1869. In April, 1885, the tract, being within the indemnity limits, was, with other tracts, selected by the railway company as indemnity for deficiencies claimed to exist within the place limits. These selections were all finally cancelled on October 23, 1896.

Upon these facts it was held that the right given to a purchaser in good faith prior to the cancellation of the selections was unquestionable. It was said (p. 241):

> In respect to certain requirements of section 5, under which the Land Department acted, there is no question. Ireland was a citizen of the United States. The tract was within the

contract made by the company with him in 1883. It had never been conveyed to the company, or for its use. It was an odd-numbered section, within the limits of the grant, and coterminous with a constructed part of the road. It was excepted from the operation of the grant because of a defect in the selection of indemnity lands.

There remained a further question, not in the case at bar, as to whether an option to purchase could be considered as a purchase. This question was resolved in favor of the patentee because of the remedial nature of the statute. On this point it was said (p. 242):

> We have more than once held that the entire statute was remedial in its nature and must be construed so as to carry out the intent of Congress and secure to the parties the intended relief. Primarily, the purpose was to secure an adjustment of the various land grants in aid of railroads. Much confusion had existed in the construction and administration of those grants. There had been conflicting decisions, and Congress attempted, without displacing vested rights, to do equity to all parties claiming interests in lands within these various grants. It did not purpose to merely define legal rights or prescribe new methods for their enforcement. The courts were competent under the law, as it stood, without additional legislation to preserve such rights.
>
> There were three parties whose interests and equities were to be regarded: First, the railway company, the beneficiary of the grant; second, parties who had dealt with the railway

company in reference to lands claimed by it to be within the scope of its grant; and, third, parties who had attempted to secure title under the settlement laws of the United States. With reference to the railway company, it is sufficient to say that Congress aimed to limit its acquisition of title to the amount of land which it had in fact earned by the construction of the road, and prescribed that the adjustment with it should be made in accordance with the rulings of this court; authorized actions to recover any lands improperly conveyed to the company, or, if the company had parted with them, the value thereof in money.

As to those who had dealt with the railway company, its evident purpose was to secure to them the lands they had contracted for, in so far as it could be done without trespassing on the rights of settlers. The scope of section 5 is disclosed by its opening words, "where any said company shall have sold." In case of a sale, certain privileges are given upon certain conditions. Nowhere does it provide as one of those conditions that the company shall have received full, or indeed any, payment. If there is a sale it is sufficient. Why in a remedial statute may not the word include a sale upon conditions, one in which the proposed buyer has an election to accept the company's promise? The section does not attempt to relieve anyone whose transactions with the railway company were not in good faith. The term "bona fide purchaser" is used in the statute; but, as we pointed out in *United States* v. *Winona &c. Railroad*, 165 U. S. 463, 480, 481,

not in any technical sense, but simply as demanding good faith in the transactions between the individual and the company.

The purpose of the statute and the character of the right created by it were further stated as follows (p. 245):

> It must be borne in mind that the purpose of section 5 was not relief to the company, but to one dealing with it. Ireland by his contract had obtained rights from the company even if he had not assumed obligations to it. The land was the property of the Government, and property to which the company acquired no title, but being within the limits of its grant it had claimed a right and contracted with Ireland as though it had or would receive the title. Section 5 gave to Ireland only a right to purchase this land from the Government—a preferential right—paying to the Government its price, no portion of which was to pass to the railway company, and gave him that preferential right because of his dealings with the company. He had sought to obtain title to this land from the company. He had made a contract by which, if the company acquired title, he could obtain that title; and Congress, by section 5, simply provided that, having so acted in respect to this land, he should have a preferential right of purchase. The company neither gains nor loses. The Government receives its price for the land, and is, therefore, fully protected, and Ireland receives that in respect to which he certainly has some equitable claim of consideration, a preferential right of purchase.

Ramsey v. *Tacoma Land Co.*, 196 U. S. 360, was a suit by a settler to have a patentee under section 5 of the act of 1887 adjudged to hold the legal title in trust for the plaintiff, and a judgment denying this relief was affirmed. The facts, in all essential respects similar to those of the present case, were stated as follows (p. 361):

> The land was within the primary limits of the grant to the Northern Pacific Railroad Company by joint resolution of Congress of May 31, 1870. 16 Stat. 378. The company filed its map of general route on August 13, 1870, and its map of definite location on May 14, 1874. The Land Department thereupon withdrew from sale and entry this with other tracts. On May 19, 1869, one W. C. Kincade made a preemption filing on the land, but had abandoned the filing and the land prior to the act of 1870. Subsequently to the filing of the map of definite location the tract was held by the company and considered by the Land Department to have passed to the company until the departmental decision of August 28, 1896, in *Corlis* v. *Railroad Company*, 23 L. D. 265 (on review 26 L. D. 652), which held that lands situated as this were excepted from the grant. In 1874 the railroad company, for value and in good faith, sold and conveyed the land to the Tacoma Land Company, a corporation created under the laws of Pennsylvania. Thereafter that company, for value and in good faith, sold to the other defendants, who also acted in good faith. The several deeds representing these transactions were

placed on record in the county where the tract is situated. On October 13, 1896, the Commissioner of the General Land Office canceled the railroad company's list of the tract in question, on the basis of the decision in *Corlis* v. *Railroad Company*. On February 24, 1897, the plaintiff filed in the local land office her application to enter the land as a homestead, which filing was accepted by the local officers, and in May of that year she went upon the land, and has there since remained, making improvements to the value of $1,200. In August, 1897, the land company filed its application to purchase the tract, under section 5 of the act of Congress of March 3, 1887. 24 Stat. 556. A contest between the plaintiff and the land company was had in the department, which resulted in a decision in its favor, and to it a patent was issued.

Only two questions were presented which had not "already been determined by this court." One whether the word "citizens" in the act of 1887 included corporations, and the other whether the purchaser had by a delay of 10 years after the act lost the right of purchase. Respecting the first, it was said that it could "scarcely be considered a debatable question," and that "obviously, in a remedial statute like this, the term 'citizens' is to be considered as including State corporations" (p. 362). And as to the second question, it was held to have been concluded by the decision of the Land Department, "a decision which, in effect, determined that the company had acted with all necessary prompt-

ness and was entitled to the benefit of the statute" (p. 363).

The principle of liberal construction of the Act of 1887 applied in these cases was reaffirmed in *Logan* v. *Davis*, 233 U. S. 613, 626–629. And the uniform practice of the Land Department under established regulations has been in accordance with the same principle. Opinion Attorney General Garland, November 17, 1887, 19 Op. A. G. 68, 71, 6 L. D. 272, 274; Circulars, November 22, 1887, 6 L. D. 276, 279; February 13, 1889, 8 L. D. 348, 351; Instructions, August 30, 1890, 11 L. D. 229; *Pierce* v. *Musser-Sauntry Co.*, 19 L. D. 136; *Miller* v. *Tacoma Land Co.*, 29 L. D. 633; *Clogston* v. *Palmer*, 32 L. D. 77, 79. See also *Krueger* v. *United States*, decided by this court March 4, 1918.

It is objected for the State (brief, 6–9) that the list of indemnity selections filed by the railroad company in 1883 was "informal," in that the losses and selections were not arranged "tract for tract" but were set out in bulk. But this is inconsequential, if true, since the right given by the fifth section of the Act of 1887 to purchasers of lands within the indemnity limits of a railroad grant does not depend upon the existence of a formal or regular selection, or even any selection. *Gertgens* v. *O'Connor*, 191 U. S. 237, 238, 241; *Pierce* v. *Musser-Sauntry Co.*, 19 L. D. 136; *Durrell* v. *Windom*, 23 L. D. 508; *Lincoln* v. *Sowers*, 24 L. D. 42.

The list was, however, formal and regular. It is true that some of the early regulations required selected and base lands to be listed tract for tract, in order that the rights of settlers might be ascertained and protected. But this requirement was modified by order of the Secretary dated May 28, 1883, which permitted withdrawn lands along the Northern Pacific Railroad to be listed in bulk, in order that those not required for indemnity might be speedily restored for the benefit of settlers. *Darland* v. *Northern Pac. R. R. Co.*, 12 L. D. 195, 196. These lands were withdrawn in 1871, and in accordance with the order of May 28, 1883, the list in question was filed October 15, 1883, and was certified by the local land officers in the regular departmental form to be correct, and was therefore "allowed and approved." 46 L. D. 10.

By a circular dated August 4, 1885, specifications of losses and selections tract for tract were required in every case, and it was directed that no further selections should be allowed until losses had been so specified for all previous selections. 4 L. D. 90. This order, however, "was not designed to invalidate selections theretofore made." *Sawyer* v. *Northern Pac. R. R. Co.*, 12 L. D. 448, 450. And it was held that "to disregard such selections would be purely arbitrary and unauthorized." *Clancy* v. *Hastings & Dakota Ry. Co.*, 17 L. D. 592, 597.

The indemnity withdrawal in this case, made in 1871, was revoked in 1887 along with all others of the same character. 6 L. D. 131. But the orders

of revocation did not restore to the public domain lands embraced in pending selections. *Dinwiddie* v. *Florida Railway & Navigation Co.*, 9 L. D. 74; *Alabama & Chattanooga R. R. Co.* v. *Morrison*, 17 L. D. 34; *Southern Pac. R. Co.*, 32 L. D. 51, 53; *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 392.

It is also objected that the preferential right conferred by the act of 1887 had not been exercised on August 3, 1892, the date of the grant to the State. The answer is that the right could not be exercised under the departmental regulations until it had been finally determined that the supposed title of the railroad company had failed, that is, until the pending selections had been canceled of record. Circular, February 13, 1889, 8 L. D. 348; 352; *Miller* v. *Tacoma Land Co.*, 29 L. D. 633, 635; *Santa Fe Pacific R. Co.*, 33 L. D. 161, 162; *Ramsey* v. *Tacoma Land Co.*, 196 U. S. 360, 363; *Krueger* v. *United States*, decided by this court March 4, 1918.

The list in question, as to the lands in controversy, was held for cancellation by the Commissioner March 20, 1907, upon the authority of *Northern Lumber Co.* v. *O'Brien*, 204 U. S. 190, decided January 14, 1907. This order was suspended by the Secretary April 1, 1907, and did not become finally effective until October 30, 1909. 46 L. D. 8. The history of these selections is set out in *Santa Fe Pacific Ry. Co.* v. *Northern Pacific Ry. Co.*, 37 L. D. 593. The application of the Immigration Land Company was filed February 9, 1907, but was not entertained until October 30, 1909, the date of final cancellation

of the selections (bill, p. 7, par. 4, 5). It is suggested that this proceeding was irregular and that the Land Company's application should have been rejected because it was filed before the selections were canceled. But the suggestion is without merit. *Miller* v. *Tacoma Land Co.*, 29 L. D. 633, 635; *Ramsey* v. *Tacoma Land Co.*, 196 U. S. 360, 363.

2. *The claim of the State under the Act of 1892.*

The act of August 3, 1892, 27 Stat. 347, reads as follows:

> That *all undisposed lands of the United States situated in the following subdivisions*, according to the public surveys thereof, to-wit: Section six of township one hundred and forty-two; sections six, seven, eighteen, nineteen, thirty, and thirty-one of township one hundred and forty-three, all in range thirty-five; sections one, two, three, and four of township one hundred and forty-two, and sections one, two, three, four, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, thirty-three, thirty-four, thirty-five, and thirty-six, of township one hundred and forty-three, all in range thirty-six, situate in the district of lands subject to sale at Saint Cloud and Crookston, Minnesota, is hereby forever granted to the State of Minnesota, to be perpetually used by said State as and for a public State park: *Provided*, That the land hereby granted shall revert to the United States, together with all improve-

ments thereon, if at any time it shall cease to be exclusively used for a public State park; or if the State shall not pass a law or laws to protect the timber thereon.

SEC. 2. *That this act shall not in any manner whatsoever interfere with, supersede, suspend, modify, or annul the vested rights of any person, company, or corporation in respect to any of said lands existing at the date of the passage of this act.*

The preferential right to a patent from the Government under the act of 1887, founded upon the purchase from the railroad company in 1891, being unquestionable, it remains to inquire whether that right was extinguished by the act of 1892. The question is mainly one of intention, though it involves also the question of power, which is worthy of notice.

It is not at all certain that this right to a patent is not a vested right in the strict sense, a property right beyond the constitutional power of Congress to divest without due process. Section 5 of the act of 1887 was an invitation to purchase from the railroad company lands which were apparently a part of its grant, upon the assurance that, if the purchase was made in good faith and the railroad title failed, a patent would issue upon further payment of the ordinary government price. That subsequent as well as prior purchases from railroad companies were contemplated has been the uniform ruling of the Land Department and is evident on the face of the act. *United States* v. *Southern Pacific R. Co.*, 184 U. S. 49, 56; *Clogston* v. *Palmer*, 32 L. D. 77, 79.

This right to a patent was inheritable and assignable like any other vested property right. The language of the act is that "thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns."

This right has been called a "privilege." *Ramsey* v. *Tacoma Land Co.*, 196 U. S. 360, 363. But by this was evidently meant a right upon condition subsequent, the condition being further payment to the Government and proof of purchase in good faith from the railroad company. It has also been said to be "not a vested right," but one that "may be modified or entirely extinguished by Congress while it is in an inchoate condition." *Clogston* v. *Palmer* (W. V. D., 1903), 32 L. D. 77, 83. But this statement was not necessary to the decision, since the right was upheld in that case as "an existing right" beyond the executive power to extinguish under the authority to establish reservations.

It is not a "privilege" in the sense of a mere revocable license or gratuity. It is not "inchoate" in the sense of a mere personal expectancy dependent upon the will of another. It is a transferable right to receive a patent founded upon a consideration paid and conditions fulfilled. Such a right is not less a valuable property right because it is subject to a further payment and proof of the prior purchase. It is like a sale of public land upon deferred payments where a portion of the price has been paid and the purchaser is not in default with respect to the balance; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 20; or a

mining location, where a discovery has been made and the locator has expended the requisite amounts for annual assessment work, but has not applied for a patent at the government price. *Bradford* v. *Morrison*, 212 U. S. 389, 394–395.

But conceding, if need be, the power to extinguish this "existing right," its exercise would be at least a breach of faith resulting in manifest injustice, and the intention to so exercise it should not be imputed to Congress except upon language admitting of no other interpretation.

Applying this principle, if the grant to Minnesota had simply been of the thirty-five designated sections as public land without reference to existing rights, such rights would nevertheless be excepted from its operation. The rule is that "in the absence of any express provision indicating otherwise, a grant of public lands only applies to lands which are at the time free from existing claims." *Bardon* v. *Northern Pacific Railroad*, 145 U. S. 535, 543, and cases cited; *Andrew J. Billan*, 36 L. D. 334, 340.

The grant was not, however, without exception. It was of "all undisposed lands of the United States situated in" the designated sections. Any of the lands previously disposed of were therefore not granted. In addition to this the act expressly excepted from the grant all "vested rights."

This exception of "vested rights," for which a separate section was inserted, and which was stated with unusual elaboration, must have been intended

for some useful purpose. But if the words "vested rights" are read in their strict technical sense, as indicating only constitutional rights, the exception would be quite obviously without use. As lands already disposed of were plainly not granted, and as constitutional rights would necessarily be attached to such lands, the term "vested rights" must be taken to mean something less than constitutional rights, if it is to have any effect as an exception from the grant. Evidently it was not the purpose to except only constitutional rights, for it must have been understood that the courts were competent under the law to preserve such rights. *Gertgens* v. *O'Connor*, 191 U. S. 237, 242. That the purpose was to save all "existing rights" that might otherwise be affected is the only rational and just interpretation.

The words of a statute are not always to be construed in their technical sense. The term "bona fide purchaser" is well understood technically to mean one who deals with the holder of a perfect legal title without notice of any existing adverse equity. Yet Congress has more than once used this term not in the technical sense but only as implying the existence of actual good faith, where there was no legal title and even though there was constructive notice. *United States* v. *Winona, &c., R. R.*, 165 U. S. 463, 480–481; *United States* v. *Southern Pacific R. Co.*, 184 U. S. 49, 52–54; *Gertgens* v. *O'Connor*, 191 U. S. 237, 243; *Logan* v. *Davis*, 233 U. S. 613, 629.

If the whole of section 2 be left out of view as excepting only constitutional rights, yet the grant itself is confined to "undisposed lands of the United States." Public lands are said to be disposed of in the sense of such grants whenever they are covered by an entry of record under the general land laws, or by "a railroad indemnity selection, presented in accordance with departmental regulations and accepted or recognized by the local officers." This is the established doctrine of this court and "the unbroken practice of the Land Department from the beginning." *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 392. In this case the selection was of that character, as we have seen, and was pending of record when the act of 1892 was passed.

But apart from any segregative effect of the railroad selection, the land in question had been otherwise "disposed" of. It had been "sold" by the railroad company as a part of its grant in 1891, and under the act of 1887 the purchaser and his assigns, through such sale, acquired the right to receive a patent. This right was existing when the grant was made to the State. To say that land which is the subject of such a right is not disposed of is to say that a sale does not amount to a disposal. The sale by the railroad company is the foundation of the right, recognized by the act of 1887 as binding on the Government, though the railroad title should fail. It was contemplated that the apparent title of the railroad might fail, and in that event the faith of the Govern-

ment was pledged to make good the title upon further payment to the Government of a nominal consideration.

It is fairly to be inferred from the report of the Committee which accompanied the bill that rights such as that belonging to the Immigration Land Company were considered and intended to be excepted. The report in full was as follows (H. Rep. No. 694, 52d Cong., 1st sess.):

> The Committee on the Public Lands, to whom was referred the bill (H. R. 222) "To grant certain lands to the State of Minnesota for perpetual use as a public park," have carefully considered the same and reported back with an amendment, viz:
>
> Add at the end of the first section the following proviso: "*Provided*, That the land hereby granted shall revert to the United States, together with all improvements thereon, if at any time it shall cease to be exclusively used for a public State park or if the State shall not pass a law or laws to protect the timber thereon," and recommend that it do pass.
>
> The following are the facts upon which the committee bases its recommendation:
>
> (1) This park in question was authorized by an act of the Legislature of the State of Minnesota, passed and approved A. D. 1891.
>
> (2) The general purpose of said act would seem to be to preserve as far as possible the forest area at the headwaters of the Mississippi River from destruction and create a forest park.

(3) The area authorized comprises about 20,000 acres; about 3,000 belonging to railroad companies, about 1,500 to the State, about 10,000 to private individuals, and about 4,000 belonging to the United States.

The lands are situated around and embrace Lake Itasca and a number of small lakes and streams constituting the sources of the Mississippi River in the State of Minnesota. The only land of any real value has already been taken by private individuals, and that remaining, the title of which is in the United States, is of very little value.

The State has already acquired title to the lands owned by the railroads for a merely nominal sum and is rapidly acquiring the title to that owned by private individuals.

Your committee are of opinion that the purpose of the Legislature of Minnesota was a laudable one and should be encouraged. We would therefore recommend that the bill pass.

It is clear the committee understood that no land would be granted which had "already been taken by private individuals." The particular lands in question had been so taken. In the Commissioner's decision, attached to the bill, it is said (p. 31) that "These particular lands were under the control of and in the possession of the grantees of the Northern Pacific Railway Company on August 3, 1892, and have remained in open and actual possession of such grantees ever since." It is a well-known custom of the Public Lands Committee to seek advice and

information from the Land Department in reference to any contemplated disposition of public lands, and it is fair to assume that the committee was in possession of the facts in this case.

It is also stated in the report that the land remaining to the United States and intended to be granted "is of very little value." It is a fair assumption that the lands "taken by private individuals" under conveyances from the railroad company and in their possession and control were of very considerable value, and hence not contemplated by the grant.

This view finds strong support in the action of the State itself; for, as stated in the Commissioner's decision (bill, p. 31):

> It appears from the record in the case that for the years from 1891 to 1912, inclusive, the State of Minnesota levied taxes upon all the lands involved, and that such taxes have been paid to the amount of $4,762.50, and that taxes were levied for the year 1913.

The bill also shows that the first assertion of title by the State was on March 5, 1912 (p. 8, par. 6). The grant of 1892 was, as asserted by counsel, of great consequence to the State. It must therefore have understood at the time what lands were granted. It took no action to dispossess the present claimants but for a period of 10 years thereafter levied and collected taxes on the land as their property. This amounts to a practical contemporaneous interpretation that these lands were not intended to be granted.

CONCLUSION.

The bill should be dismissed for want of indispensable parties who can not be joined, and also for want of equity.

Respectfully submitted.

FRANCIS J. KEARFUL,
Assistant Attorney General.

MARCH, 1918.

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THE case is stated in the opinion.

Mr. Assistant Attorney General Kearful, for defendants, in support of the motion.

Mr. Charles R. Pierce, with whom *Mr. Lyndon A. Smith*, Attorney General of the State of Minnesota, and *Mr. Clifford L. Hilton*, Deputy Attorney General of the State of Minnesota, were on the brief, for complainant, in opposition to the motion.

MR. JUSTICE DAY delivered the opinion of the court.

This bill of complaint is filed by the State of Minnesota to quiet title to certain lands in that State, and to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from issuing patents for the lands to the Immigration Land Company, a corporation of the State of Minnesota. The defendants filed a motion to dismiss the bill upon the following grounds:

"1. The court is without jurisdiction to entertain this suit because it is in substance and effect against the United States, which has not consented to be sued or waived its immunity from suit.

"2. There is a defect of parties defendant which can not be cured without depriving the court of jurisdiction.

"3. The relief prayed for would be an invasion of the lawful jurisdiction of the defendants as officers of the Land Department.

"4. The bill of complaint does not state facts sufficient to entitle the State of Minnesota to any relief."

From the allegations of the bill it appears that the State claims title to the lands under the Act of August 3, 1892, 27 Stat. 347.[1]

[1] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all undisposed lands of

The Immigration Land Company claims title under § 5 of the Act of March 3, 1887, 24 Stat. 556,[1] relat-

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the United States situated in the following subdivisions, according to the public surveys thereof, to-wit: Section six of township *one hundred and forty-two;* sections six, seven, eighteen, nineteen, thirty, and thirty-one of township *one hundred and forty-three*, all in *range thirty-five;* sections one, two, three, and four of township *one hundred and forty-two*, and sections one, two, three, four, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, thirty-three, thirty-four, thirty-five, and thirty-six, of township *one hundred and forty-three, all in range thirty-six*, situate in the district of lands subject to sale at Saint Cloud and Crookston, Minnesota, is hereby forever granted to the State of Minnesota, to be perpetually used by said State as and for a public State park: *Provided*, That the land hereby granted shall revert to the United States, together with all improvements thereon, if at any time it shall cease to be exclusively used for a public State park; or if the State shall not pass a law or laws to protect the timber thereon.

Sec. 2. That this act shall not in any manner whatsoever interfere with, supersede, suspend, modify, or annul the vested rights of any person, company, or corporation in respect to any of said lands existing at the date of the passage of this act.

[1] That where any said company shall have sold to citizens of the United States, or to any persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being contiguous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section

ing to the adjustment of land grants to railroad companies.

The last-named statute provides that where the railroad company shall have sold to citizens of the United States as a part of its grant, lands not conveyed to or for the use of the company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of the road, and where the lands so sold are for any reason excepted from the operation of the grant, it shall be lawful for a *bona fide* purchaser thereof from said company, to make payment to the United States for the lands at the ordinary government price for like lands, and thereupon patents shall issue to the *bona fide* purchaser, his heirs or assigns.

Under this act, on February 9, 1907, the Land Company made application in the Land Department to purchase the land, claiming to be the assignee of a *bona fide* purchaser of the lands from the railroad company. The State of Minnesota protested against the issuance of a patent to the Immigration Land Company, and claimed the land under the Act of August 3, 1892, under which undisposed-of lands of the United States, situated in certain sections and townships, were granted to the State for a public park. The Act of 1892 also provides that it shall not in any manner interfere with, supersede, suspend, modify or annul the vested right of any person, company, or corporation in respect to any of the land existing at the date of the passage of the act.

A hearing was had before the Commissioner of the General Land Office upon the issue made between the

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shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

State of Minnesota and the Immigration Land Company, wherein the Commissioner held:

"These tracts of land are within the second indemnity limits of the grant to the Northern Pacific Railroad (now Railway) Company, under act of July 2, 1864 (13 Stat., 365), as amended by Joint Resolution of May 31, 1870 (16 Stat., 378). On October 15, 1883, said railway company selected all of the above described tracts of land per list No. 12, Crookston, rearranged list No. 12 filed April 19, 1893. The bases given in support of the selections covered by such rearranged list were lands claimed to have been excepted from the company's grant of July 2, 1864, supra, by reason of the reservation subsisting at the date thereof on account of the grant made by the act of May 5, 1864 (13 Stat., 64), to aid in the construction of the Lake Superior and Mississippi Railroad.

"Said list of selections No. 12 was canceled as to these and other tracts of land by letter 'F' of March 20, 1907, upon authority of the decision of the Supreme Court of the United States in the case of the *Northern Lumber Company* v. *O'Brien* (204 U. S. 190), but the cancellation was suspended by the order of the Secretary of the Interior on April 1, 1907, and remained in that status until October 30, 1909, when said list of selections No. 12 was canceled as to these and other tracts of land.

* * * * * * * *

"The lands above described, with others were sold and conveyed by the Northern Pacific Railway Company by warranty deed for a valuable consideration, January 14, 1891, to Frederick Weyerhaeuser, Peter Musser and M. G. Norton, whose title was afterwards conveyed by certain mesne conveyances to the applicant Immigration Land Company as set forth in its application to purchase dated February 2, 1907, and filed in your office February 9, 1907."

Of the issues involved the Commissioner said:

"The attorneys on behalf of the State of Minnesota

contend that the lands herein involved, which are situated within the limits of the Itasca State Park, were granted to the State by act of August 3, 1892 (27 Stat., 347), and it is urged on the part of the State that the grant took effect immediately, the lands being 'undisposed of' on that date, and that the claim asserted by the Immigration Land Company does not have the dignity of the 'vested right' protected in Sec. 2 of said act.

"On behalf of the Immigration Land Company it is contended that these lands were segregated from the mass of public lands by Crookston indemnity list of selections No. 12, made October 15, 1883, which was not canceled from the records until October 30, 1909; that the sale of the lands covered by cash entry No. 05008, in the name of the Immigration Land Company, by said railway company on January 14, 1891, was bona fide and for a valuable consideration, and it is urged that the Immigration Land Company should have its purchase of said lands protected under Sec. 5 of the act of March 3, 1887 (24 Stat., 556), and receive patent therefor; the attorneys for the Land Company contending that the lands involved were not 'undisposed of lands' on August 3, 1892, the date of the grant to the State."

After an opinion, in which the issues were considered, the Commissioner reached the conclusion:

"Accordingly, it is held that under Sec. 5 of the act of March 3, 1887, the rights of the Immigration Land Company under the facts and laws above cited are superior to the claim of the State under the act of August 3, 1892, that cash entry 05008 by said Immigration Land Company should remain intact.

"The protest of the State is hereby dismissed subject to the usual right of appeal within thirty days after notice to the Secretary of the Interior."

The decision of the Commissioner of the General Land Office was affirmed by the Secretary of the Interior, and

a rehearing denied. *State of Minnesota* v. *Immigration Land Co.*, 46 L. D. 14.

The purpose of the bill filed in this case is to quiet title to the lands in controversy by a decree in favor of the State of Minnesota notwithstanding the decision of the Secretary of the Interior, and to enjoin that officer from issuing patents for the lands to the Immigration Land Company.

We are of opinion that the State has mistaken its remedy, and if it be true that the Secretary has made a mistake in overruling the contention of the State that the title passed to it under the Act of August 3, 1892, relief must be sought in the courts after the issuance of patent.

The grant to the State of August 3, 1892, was of all undisposed of lands in certain townships, and § 2 specifically provided that it should not interfere with, supersede, suspend, modify or annul the vested rights of any person, company, or corporation in respect to any of said lands existing at the date of the passage of the act. The Act of March 3, 1887, permitting *bona fide* purchasers of certain lands, in the manner which we have stated, to make payment and acquire title to the lands excepted from the operation of the railroad grant, was then in full force. A part of these lands had been purchased before the act granting them to the State, by the predecessors of the Immigration Land Company, and the Secretary of the Interior held that the title thus acquired was superior to that of the State, and, in accordance with the decision of the Secretary, patents were about to be issued to it as a *bona fide* purchaser. This decision is not of an arbitrary character, and was made upon full hearing before the department of the Government entrusted with the administration of the public land laws, and the patents were still unissued when this suit was brought.

This is not a case where the title had passed absolutely in favor of the claimant, as was the fact in *Lane* v. *Watts*,

234 U. S. 525; 235 U. S. 17. It is a case where the grant was in terms of "undisposed-of lands," and subject to the vested rights of others. As against those holding such lands the title was not intended to pass.

The Act of 1887, under which the Immigration Land Company claims title, specifically provides that patents shall be issued for lands to which the purchaser is entitled. The patents not having issued, the lands in controversy were still in course of administration in that department of the Government which, until patent issues, has exclusive control of proceedings to acquire the title.

As we have said, the remedy must be sought in the courts after the issuance of patent. Under such circumstances as are here disclosed this court has uniformly so held. *Litchfield* v. *The Register*, 9 Wall. 575, 577; *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 592, 593; *Brown* v. *Hitchcock*, 173 U. S. 473; *Kirwan* v. *Murphy*, 189 U. S. 35; *Lane* v. *Mickadiet*, 241 U. S. 201, 208, 209.

It follows that the bill of the State must be dismissed, and it is so ordered.

Dismissed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

STATE OF MINNESOTA v. LANE, SECRETARY OF THE INTERIOR, ET AL.

IN EQUITY.

No. 20. Original. Motion to dismiss. Argued April 15, 1918.—Decided June 3, 1918.

An act of Congress granted the "undisposed of" lands in certain sections to a State, saving "vested rights" of others existing at its date. Part of the described tracts, here in question, within the indemnity limits of the Northern Pacific, had previously been selected by that railroad and by it sold to purchasers in good faith. After the date of the act, the selections were canceled as being founded on improper bases, but the Land Department, upon fully hearing the State, allowed an application of the purchasers' assignee, made meanwhile, to purchase the lands in question from the United States, and secure patents therefor, under the Adjustment Act of March 3, 1887. *Held*, that the decision was not arbitrary, and that a suit against the Secretary of the Interior and the Commissioner of the General Land Office, brought by the State before the patents issued, to enjoin their issuance and to quiet its title, would not lie. *Lane* v. *Watts*, 234 U. S. 525, distinguished.

Dismissed.